RULES

and

INTERNAL OPERATING PROCEDURES

OF THE

UNITED STATES COURT OF APPEALS

FOR THE

FIFTH CIRCUIT

November 1, 2004

NOTE: There are no 5TH CIR. R. 1-2, 4, 6-7, 13-14, 16, 18-20, 23-24, 33, 36-38, 43-44 and 48. The FIFTH CIRCUIT RULES are numbered to correspond to the appropriate FEDERAL RULES OF APPELLATE PROCEDURE that they supplement.

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5TH CIR. R. 3 *FILING FEE*

Filing Fee. *When the notice of appeal is filed, the $255 fees established by 28 U.S.C. §§ 1913 and 1917 must be paid to the district court clerk. After the Fifth Circuit receives a duplicate copy of a notice of appeal, the clerk will send counsel or a party notice advising of other requirements of the rule. No additional fees are required. Failure to pay the fees does not prevent the appeal from being docketed, but is grounds for dismissal under 5TH CIR. R. 42.*

5TH CIR. R. 5 *LENGTH OF PETITION*

Length*. The certificate of interested persons required by 5TH CIR. R. 28.2.1 does not count toward the page limit.*

5TH CIR. R. 8 *STAY OR INJUNCTION PENDING APPEAL*

Procedures in Death Penalty Cases Involving Applications for Immediate Stay of Execution and Appeals in Matters in Which the District Court Has Either Entered or Refused To Enter a Stay

8.1 Documents Required. *Non-death penalty cases will be handled as described in FED. R. APP. P. 8. Death penalty cases arising from actions brought under 28 U.S.C. §§ 2254 and 2255 will be processed under the procedures found in this rule. The appellant must file 4 copies of the motion for stay and attach, to each, legible copies of the documents listed below. If the appellant asserts there is insufficient time to file a written motion, the appellant must deliver to the clerk 4 legible copies of each of the listed documents as soon as possible. If the appellant cannot attach or deliver any listed document, a statement why it cannot be provided must be substituted. The documents required are:*

(a) The complaint or petition to the district court;

(b) Each brief or memorandum of authorities filed by both parties in the district court;

(c) The opinion giving the district court's reasons for denying relief;

(d) The district court judgment denying relief;

(e) The application to the district court for a stay;

(f) The district court order granting or denying a stay, and the statement of reasons for its action;

(g) The certificate of appealability or, if there is none, the order denying a certificate of appealability;

(h) A copy of each state or federal court opinion or judgment involving any issue presented to this court or, if the ruling was not made in a written opinion or judgment, a copy of the relevant portions of the transcript.

8.1.1 If the state indicates that it does not oppose the stay, and the applicant states this fact in the application, these documents do not need to be filed with the application but must be filed within 10 days after the application is filed.

8.1.2 If the appellant raises an issue that was not raised before the district court or has not been exhausted in state court, the applicant must give the reasons why prior action was not taken and why a stay should be granted.

8.2 Panels. *Death penalty case matters are handled by special panels selected in rotation from the court's regular screening panels. See 5TH CIR. R. 27.2.3 for handling applications for certificates of appealability.*

8.3 Motions To Vacate Stays. *If the district court enters an order staying execution of a judgment, the party seeking to vacate the stay will attach 4 copies of each of the documents required by 5TH CIR. R. 8.1 to the motion.*

8.4 Emergency Motions. *Emergency motions or applications, whether addressed to the court or to an individual judge, must be filed with the clerk rather than with an individual judge. If there is insufficient time to file a motion or application in person, by mail, or by fax, counsel may communicate with the clerk by telephone and thereafter must file the motion in writing with the clerk as soon as possible. The motion, application, or oral communication must contain a brief account of the prior actions of this or any other court or judge to which the motion or application, or a substantially similar or related petition for relief, was submitted.*

8.5 Merits. *The parties must address the merits of each issue presented by an application. The panel may allow additional time to permit the parties adequate opportunity to do so.*

8.6 Consideration of Merits. *If a certificate of appealability has been granted, the panel assigned to decide a motion for a stay of a state court judgment must, before denying a stay, consider and expressly rule on the merits of the appeal, unless the panel finds that the appeal is frivolous and entirely without merit.*

8.7 Vacating Stays. *The panel assigned to an appeal must consider the merits before vacating a stay of execution, unless the panel rules the appeal is frivolous and entirely without merit.*

8.8 Mandate. *The panel may order the mandate issued instantly or after such time as it may fix.*

8.9 Stays of Execution Following Decision. *Stays to permit the filing and consideration of a petition for a writ of certiorari ordinarily will not be granted. The court must determine whether there is a reasonable probability that 4 members of the Supreme Court would consider the underlying issues sufficiently meritorious for the grant of certiorari and whether there is a substantial possibility of reversal of its decision, in addition to a likelihood that irreparable harm will result if its decision is not stayed.*

8.10 Time Requirements for Habeas Petitions. *Habeas petitioners sentenced to death who wish to appeal an adverse judgment by the district court on a first petition for writ of habeas corpus, or who seek permission to file a successive petition, must exercise reasonable diligence in moving for a certificate of appealability or for permission to file a second or successive habeas petition, and a stay of execution with the clerk of this court at least 5 days before the scheduled execution. Counsel who seek a certificate of appealability or permission to file a successive petition less than 5 days before the scheduled execution must attach to the proposed filing a detailed explanation stating under oath the reason for the delay. If the motions are filed less than 5 days before the scheduled execution, the court may direct counsel to show good cause for the late filing. If counsel cannot do so, counsel will be subject to sanctions.*

If the state asks this court to vacate a district court order staying an execution, counsel for the state will file the state's appeal and application for relief from the stay as soon as practicable after the district court issues its order. Any unjustified delay by the state's counsel in seeking relief in this court will subject counsel to sanctions.

5TH CIR. R. 9 RELEASE IN A CRIMINAL CASE

9.1 Release Before Judgment of Conviction. *The clerk's office will advise counsel of the requirements of this rule after receiving a copy of a notice of appeal from the district court from an order respecting release entered prior to a judgment of conviction (FED. R. APP. P. 9(a)), or on counsel's advice a notice of appeal has been or will be filed.*

Four copies of a memorandum must be filed within 7 days of the filing of the notice of appeal, clearly setting out the nature and circumstances of the offense charged and why the order respecting release is unsupported by the district court proceedings.

9.2 Release After Judgment of Conviction. *The original and 3 copies of an application regarding release pending appeal from a judgment of conviction (FED. R. APP. P. 9(b)) must be filed with the clerk of this court.*

(a) The application for release must contain:

(1) The appellant's name;

(2) The district court docket number;

(3) The offense of which appellant was convicted; and

(4) The date and terms of sentence.

(b) The application must also contain:

(1) The legal basis for the contention that appellant is unlikely to flee or pose a danger to the safety of any other person or the community;

(2) An explanation why the district court's findings are clearly erroneous; and

(3) The issues to be raised on appeal that present substantial questions of law or fact likely to result in reversal or an order for a new trial on all counts of the indictment on which incarceration has been imposed, with pertinent legal argument establishing that the questions are substantial.

9.3 Required Documents. *A copy of the district court's order respecting release pending trial or appeal, containing the written reasons for its ruling, must be appended to the memorandum or the application filed under 5TH CIR. R. 9.1 or 9.2.*

(a) If the appellant questions the factual basis of the order, a transcript of the district court proceedings on the motion for release must be filed with this court. If the transcript is not filed with the memorandum or application, the appellant must attach a court reporter's certificate verifying that the transcript has been ordered and that satisfactory financial arrangements have been made to pay for it, together with the transcript's estimated date of completion.

(b) If the appellant cannot obtain a transcript of the proceedings, the appellant must state in an affidavit the reasons why not.

9.4 Service. *A copy of the memorandum or application filed under 5TH CIR. R. 9.1 or 9.2 must be hand-delivered to government counsel or served by other expeditious method.*

9.5 Response. *The opposing party must file a written response to all requests for release within 7 days after service of the memorandum or application.*

5TH CIR. R. 10 THE RECORD ON APPEAL

10.1 Appellant's Duty to Order the Transcript. *The appellant's order of the transcript of proceedings, or parts thereof, contemplated by FED. R. APP. P. 10(b), must be on a form prescribed by the clerk. Counsel will furnish a copy of the order form to the clerk and to the other parties set out in FED. R. APP. P. 10(b). If no transcript needs to be ordered, appellant must file with the clerk a copy of a certificate to that effect that counsel served on the parties under FED. R. APP. P. 10(b).*

10.2 Form of Record. *The record on appeal must be bound in a manner that facilitates reading. The district court clerk must number the pages consecutively.*

I.O.P. - THE DISTRICT COURT WILL FURNISH A TRANSCRIPT ORDER FORM, REQUIRED BY THIS COURT, WHEN THE NOTICE OF APPEAL IS FILED. ONCE COUNSEL COMPLETES THE TRANSCRIPT ORDER, FORWARDS IT TO THE REPORTER, AND MAKES ADEQUATE FINANCIAL ARRANGEMENTS, COUNSEL'S RESPONSIBILITY UNDER FED. R. APP. P. 10 AND 11 IS FULFILLED.

5TH CIR. R. 11 TRANSMISSION OF THE RECORD

11.1 Duties of Court Reporters. *In all cases where transcripts are ordered, the court reporter must use a form provided by the clerk of this court and:*

(a) Acknowledge receiving the transcript order, and indicate the date of receipt;

(b) State whether adequate financial arrangements have been made under the CJA, or otherwise;

(c) Provide the number of trial or hearing days involved in the transcript, and estimate the total number of pages;

(d) Give an estimated date when the transcript will be finished; and

(e) Certify that he or she expects to file the transcript with the district court clerk within the time estimated.

11.2 Requests for Extensions of Time. *Court reporters seeking extensions of the time for filing the transcript beyond the 30 day period fixed by FED. R. APP. P. 11(b) must file an extension request with the clerk of this court and must specify in detail:*

(a) The amount of work accomplished on the transcript;

(b) A list of all outstanding transcripts due to this and other courts, including the due dates for filing; and

(c) A verification that the trial court judge who tried the case is aware of and approves the extension request.

If a court reporter's request for an extension of time is granted, he or she must promptly notify all counsel or unrepresented parties of the extended filing date and send a copy of the notification to this court.

11.3 Duty of the Clerk. *The district court clerk is responsible for determining when the record on appeal is complete for purposes of the appeal. Unless the record on appeal is sent to this court within 15 days from the filing of the notice of appeal or 15 days after the filing of the transcript of any trial proceedings, whichever is later, the district court clerk must advise the clerk of this court of the reasons for delay and request an extension to file the record. The clerk of this court may grant an extension for no more than 45 days. Extensions beyond 45 days are referred to a single judge. When transmitting the record on appeal in a direct criminal appeal involving more than one defendant, the district court must*

separate and identify the pleadings and any transcripts of pre-trial, sentencing, and post-trial hearings that apply to fewer than all of the defendants. However, only one copy of the trial transcript is required. In an action involving more than one defendant at trial but where separate actions are filed under 28 U.S.C. § 2255, the district court must separate and identify the pleadings and transcripts of pre-trial, sentencing, and post-trial hearings that apply to less than all of the defendants. One copy of the trial transcript is required for each defendant filing a separate § 2255 action.

I.O.P. - THE CLERK WILL MONITOR ALL OUTSTANDING TRANSCRIPTS AND DELAYS.

ON OCTOBER 11, 1982, THE FIFTH CIRCUIT JUDICIAL COUNCIL ADOPTED A RESOLUTION REQUIRING EACH DISTRICT COURT IN THE FIFTH CIRCUIT TO DEVELOP A COURT REPORTER MANAGEMENT PLAN PROVIDING FOR THE DAY-TO-DAY MANAGEMENT AND SUPERVISION OF AN EFFICIENT COURT REPORTING SERVICE WITHIN THE DISTRICT COURT. THESE PLANS MUST PROVIDE FOR THE SUPERVISION OF COURT REPORTERS IN THEIR RELATIONS WITH LITIGANTS AS SPECIFIED IN THE COURT REPORTER ACT, INCLUDING FEES CHARGED FOR TRANSCRIPTS, ADHERENCE TO TRANSCRIPT FORMAT PRESCRIPTIONS, AND DELIVERY SCHEDULES. THE PLANS MUST ALSO PROVIDE THAT A JUDGE, THE CLERK, OR SOME OTHER PERSON DESIGNATED BY THE COURT SUPERVISES THE COURT REPORTERS.

5TH CIR. R. 12 REPRESENTATION STATEMENT

Counsel can satisfy the "representation statement" required by FED. R. APP. P. 12(b) by completing this court's "Notice of Appearance Form" and returning it to the clerk within 30 days of filing the notice of appeal.

5TH CIR. R. 15 REVIEW OR ENFORCEMENT OF AN AGENCY ORDER - HOW OBTAINED; INTERVENTION

15.1 Docketing Fee and Copy of Orders - Agency Review Proceedings. *At the time a party files a petition for review under FED. R. APP. P. 15, the party must:*

(a) Pay the filing fee to the clerk; and

(b) Attach a copy of the order or orders to be reviewed.

15.2 Proceedings for Enforcement of Orders of the National Labor Relations Board. *In National Labor Relations Board enforcement proceedings under FED. R. APP. P. 15(b), the respondent is considered the petitioner, and the board the respondent, for briefing and oral argument purposes, unless otherwise ordered by the court.*

15.3 Proceedings for Review of Orders of the Federal Energy Regulatory Commission.

15.3.1 Petition for Review. Every petition for review must specify in its caption the number, date, and identification of the order reviewed and append the service list required by FED. R. APP. P. 15(c). Counsel filing the petition must attach a certificate that the commission has posted, filed or entered the order being reviewed.

15.3.2 Docketing. All petitions for review and other documents concerning commission orders in the same number series (i.e., 699, 699A, 699B) are assigned to the same docket.

15.3.3 Intervention.

(a) Party. A party to a commission proceeding may intervene in a review of the proceeding in this court by filing a notice of intervention. The notice must state whether the intervenor is a petitioner who objects to the order or a respondent who supports the order. A notice of intervention confers petitioner or respondent status on the intervening party as to all proceedings.

(b) Nonparty. A person who is not a party to a commission proceeding desiring to intervene in a review of that proceeding must file with the clerk, and serve upon all parties to the proceeding, a motion for leave to intervene. The motion must contain a concise statement of the moving party's interest, the grounds upon which intervention is sought, and why the interest asserted is not adequately protected by existing parties. Oppositions to such motions must be filed within 10 days of service.

15.3.4 Docketing Statement. All parties filing petitions for review must file a joint docketing statement within 30 days of the filing of the initial petition for review, but not later than 10 days after the expiration of the period permitted for filing a petition for review. The docketing statement must:

(a) List each issue to be raised in the review;

(b) List any other pending review proceeding of the same order in any other court; and

(c) Attach copies of the order to be reviewed.

Every petitioner filing for review after filing a docketing statement must specify in the petition for review any exceptions taken or additions to the issues listed in the docketing statement. Every party who intervenes after the filing of the docketing statement must specify in the notice of intervention any exceptions taken to the issues listed in the docketing statement.

15.3.5 Prehearing Conference. The clerk may give notice of a prehearing conference 10 days after filing of a docketing statement, or 10 days after entry of an order by the court deciding a venue issue, whichever is later. The prehearing conference will:

(a) Simplify and define issues;

(b) Agree on an appendix and record;

(c) Assign joint briefing responsibilities and schedule briefs; and

(d) Resolve any other matters aiding in the disposition of the proceeding.

Except for good cause, any party who petitions for review or intervenes after prehearing conference has been held is bound by the result of the prehearing conference.

15.3.6 Severance. Any petitioner or respondent may move to sever parties or issues by showing prejudice.

15.4 Proceedings for Review of Orders of the Benefits Review Board. *In petitions filed by either the claimant or the employer under 33 U.S.C. § 921 to review orders of the Benefits Review Board, the Office of Workers Compensation of the United States Department of Labor, the nominal respondent, is aligned with the claimant for briefing and oral argument purposes, unless otherwise ordered by the court. Within 30 days of the filing of the petition for review of the board's decision, the petitioner must file a statement of the issues to be presented on appeal and serve them on the director and counsel for all parties so the appropriate alignment can be made.*

15.5 Time for Filing Motion for Intervention. *A motion to intervene under FED. R. APP. P. 15(d) should be filed promptly after the petition for review of the agency proceeding is filed, but not later than 10 days prior to the due date of the brief of the party supported by the intervenor.*

5TH CIR. R. 17 FILING OF THE RECORD

Filing of the Record. *Any agency failing to file the record within 40 days, must request an extension of time and provide specific reasons justifying the delay. The clerk may grant an extension for no more than 30 days. After such an extension expires, the court may order production of the record.*

5TH CIR. R. 21 WRITS OF MANDAMUS AND PROHIBITION, AND OTHER EXTRAORDINARY WRITS

Petition for Writ. *The petition must contain a certificate of interested persons as described in 5TH CIR. R. 28.2.1. The certificate of interested persons and the items required by 5TH CIR. R. 21 do not count toward the page limit.*

In addition to the items required by FED. R. APP. P. 21, the application must contain a copy of any memoranda or briefs filed in the district court supporting the application to that court for relief and any memoranda or briefs filed in opposition, as well as a transcript of any reasons the district court gave for its action.

5TH CIR. R. 22 APPLICATIONS FOR CERTIFICATES OF APPEALABILITY AND MOTIONS FOR PERMISSION TO FILE SECOND OR SUCCESSIVE HABEAS CORPUS APPLICATIONS

Applications for certificates of appealability, motions for permission to file second or successive applications under 28 U.S.C. §§ 2254 and 2255, and any responses must conform to the format requirements and the length limitations of FED. R. APP. P. 32(a), and 5TH CIR. R. 32 as applicable.

I.O.P. TO FED. R. APP. P. 22 - SEE 5TH CIR. R. 27.3 CONCERNING EMERGENCY MOTIONS.

I.O.P. TO FED. R. APP. P. 23 - SEE 5TH CIR. R. 9.2 FOR PROCEDURES GOVERNING APPLICATIONS FOR RELEASE.

5TH CIR. R. 25 FILING AND SERVICE

25.1 Facsimile Filing. *The clerk may accept, for filing, papers sent by facsimile in situations the clerk determines are emergencies or that present other compelling circumstances.*

25.2 Electronic Filing. *In cases or classes of cases that the court may select, the clerk may allow a moving party to file a required document electronically. (Facsimile filing is distinguished from "electronic" filing and is covered by Rule 25.1 above.) If electronic filing is permitted, the clerk shall advise the parties of acceptable formats and procedures. Adobe Acrobat PDF format is the preferred standard. Any account name and password the clerk issues to facilitate an electronic filing shall be kept confidential and used solely for electronic filings of such papers and briefs as the clerk may permit. The electronic image of the document constitutes the original document for all court purposes. Filing is complete when the document is received in the clerk's database.*

To each electronically filed document, the filer must add a certificate verifying that the original paper document was signed by the attorney or party shown as the filer. The filer must maintain the signed original paper document at least until the appellate process is complete, including action on any petition for writ of certiorari to the United States Supreme Court. Upon request, the signed original paper document must be provided to other parties or to the court.

The clerk may allow a district court clerk to transmit the notice of appeal and other required docketing documents electronically.

The clerk may require paper copies of any documents filed electronically. See 5TH CIR. R. 30 and 32 for instructions regarding the procedures for electronic filing of record excerpts and briefs, if permitted.

25.3 Electronic Noticing. *In cases or classes of cases that the court may select, the clerk is authorized to serve all papers, including opinions, electronically on any party who consents to such manner of service. Parties who agree to accept electronic notice must agree the electronic notice will be the only notice provided by the clerk.*

I.O.P. - LIMITS ON RECOVERY OF MAILING OR COMMERCIAL CARRIER DELIVERY COSTS. SEE 5TH CIR. R. 39.2.

5TH CIR. R. 26 COMPUTATION AND EXTENSION OF TIME

26.1 Computing Time. *Except for briefs and record excerpts, all other papers, including petitions for rehearing, are not timely unless the clerk actually receives them within the time fixed for filing. Briefs and record excerpts are deemed filed on the day sent to the clerk electronically where permitted by 5TH CIR. R. 30 and 32, by a third-party commercial carrier for delivery within 3 calendar days, or on the day of mailing if the most expeditious form of delivery by mail is used. The additional 3 days after service by mail, by electronic means, or after delivery to a commercial carrier for delivery within 3 calendar days*

referred to in FED. R. APP. P. 26(c), applies only to matters served by a party and not to filings with the clerk of such matters as petitions for rehearing under FED. R. APP. P. 40, petitions for rehearing en banc under FED. R. APP. P. 35, and bills of costs under FED. R. APP. P. 39.

26.2 Extensions of Time. *The court requires timely filing of all papers within the time period allowed by the rules, without extensions of time, except for good cause. Appeals which are not processed timely will be dismissed for want of prosecution without further notice under 5TH CIR. R. 42. If the parties or counsel waive their right to file a reply brief, they must immediately notify the clerk to expedite submitting the case to the court.*

5TH CIR. R. 26.1 CERTIFICATE OF INTERESTED PERSONS

26.1.1 Corporate Disclosure Statement. *The court uses a "Certificate of Interested Persons" in lieu of a Corporate Disclosure Statement. See 5TH CIR. R. 28.2.1.*

5TH CIR. R. 27 MOTIONS

27.1 Clerk May Rule on Certain Motions. *Under FED. R. APP. P. 27(b), the clerk has discretion to act on, in accordance with the standards set forth in the applicable rules, or to refer to the court, the procedural motions listed below. The clerk's action is subject to review by a single judge upon a motion for reconsideration made within the 14 or 45 day period set by FED. R. APP. P. 40.*

27.1.1 To extend the time for: filing answers or replies to pending motions; paying filing fees; filing motions to proceed in forma pauperis; filing petitions for panel rehearing and rehearing en banc, and for reconsideration of single judge orders, for not longer than 14 days, 30 days if the applicant for extension is a prisoner proceeding pro se; filing briefs as permitted by 5TH CIR. R. 31.4; filing bills of costs; and filing applications under the Equal Access to Justice Act.

27.1.2 To rule on motions to file briefs out of time.

27.1 3 To stay further proceedings in appeals.

27.1.4 To correct briefs or pleadings filed in this court at counsel's request.

27.1.5 To stay the issuance of mandates pending certiorari in civil cases only, for no more than 30 days, provided the court has not ordered the mandate issued earlier.

27.1.6 To reinstate appeals dismissed by the clerk.

27.1.7 To enter and issue consent decrees in labor board and other government agency review cases.

27.1.8 To enter CJA Form 20 orders continuing trial court appointment of counsel on appeal for purposes of compensation.

27.1.9 To consolidate appeals.

27.1.10 To withdraw appearances.

27.1.11 To supplement or correct records.

27.1.12 To incorporate records or briefs on former appeals.

27.1.13 To file reply or supplemental briefs in addition to the single reply brief permitted by FED. R. APP. P. 28(c) prior to submission to the court.

27.1.14 To file an amicus curiae brief under FED. R. APP. P. 29 (see 5TH CIR. R. 29.4).

27.1.15 To enlarge the number of pages of optional contents in record excerpts.

27.1.16 To extend the length limits for: briefs under FED. R. APP. P. 32(a)(7) and 5TH CIR. R. 32; petitions for rehearing en banc and panel rehearing under FED. R. APP. P. 35(b)(2), and 40(b); certificates of appealability and motions for permission to file second or successive habeas corpus applications under 28 U.S.C. §§ 2254 and 2255, under 5TH CIR. R. 22; petitions for permission to appeal under 5TH CIR. R. 5; and petitions for mandamus and extraordinary writs under 5TH CIR. R. 21.

27.1.17 To proceed in forma pauperis, see FED. R. APP. P. 24 and 28 U.S.C. § 1915;

27.1.18 To appoint counsel or to permit appointed counsel to withdraw;

27.1.19 To obtain transcripts at government expense.

27.2 Single Judge May Rule on Certain Motions. *Pursuant to FED. R. APP. P. 27(c), any single judge of this court has discretion, subject to review by a panel upon a motion for reconsideration made within the 14 or 45 day period set forth in FED. R. APP. P. 40, to take appropriate action on the following procedural motions:*

27.2.1 The motions listed in 5TH CIR. R. 27.1 that have been referred to a single judge for initial action, or for single judge reconsideration of a ruling made by the clerk, but the judge is not limited to the time restrictions in 5TH CIR. R. 27.1.1.

27.2.2 To permit interventions in agency proceedings pursuant to FED. R. APP. P. 15(d).

27.2.3 To act on applications for certificates of appealability under FED. R. APP. P. 22(b) and 28 U.S.C. § 2253 except for death penalty cases where a three judge panel must act.

27.2.4 To extend for good cause the times prescribed by the Federal Rules of Appellate Procedure or by the rules of this court except for enlarging the time for initiating an appeal, see FED. R. APP. P. 26(b).

27.2.5 To substitute parties under FED. R. APP. P. 43.

27.2.6 To exercise the power granted in FED. R. APP. P. 8 and 9, respecting stays, or injunctions, or releases in criminal cases pending appeal, and subject to the restrictions set out in those rules; and to exercise the power granted in FED. R. APP. P. 18, respecting stays pending review of agency decisions or orders, subject to the restrictions on the power of a single judge contained in that rule.

27.2.7 To stay the issuance of mandates or to recall same pending certiorari.

27.2.8 To expedite appeals.

27.2.9 To strike a nonconforming brief or record excerpts as provided in 5TH CIR. R. 32.6 and to strike other papers not conforming to the FED. R. APP. P. and 5TH CIR. R.

27.3 Emergency Motions. *Counsel ordinarily should file emergency motions or applications with the clerk rather than with an individual judge. Where time does not permit filing a motion or application by mail or hand delivery, counsel may contact the clerk by telephone and request permission to file by fax; if fax filing is impractical, then the clerk may, in extraordinary cases, accept and forward to the court a telephone communication; thereafter, counsel must file the motion in writing with the clerk as promptly as possible (whether or not previously faxed). The motion, application, or contact must contain a brief account of the prior actions of this or any other court or judge to which the motion or application, or a substantially similar or related petition for relief, has been submitted.*

27.4 Form of Motions. *Parties or counsel must comply with the requirements of FED. R. APP. P. 27 including the length limits of FED. R. APP. P. 27(d)(2). Except for purely procedural matters, motions must include a certificate of interested persons as described in 5TH CIR. R. 28.2.1. Where a single judge or the clerk may act only an original and 1 copy need be filed. All motions requiring panel action require an original and 3 copies.* ***All motions must state that the movant has contacted or attempted to contact all other parties and must indicate whether an opposition will be filed.***

27.5 Motions To Expedite Appeal. *Such motions are presented in the same manner as other motions. Only the court may expedite an appeal and only for good cause. If an appeal is expedited, the clerk will fix a briefing schedule unless a judge directs a specific date.*

I.O.P.

TYPEFACE AND TYPE STYLES FOR MOTIONS

MOTIONS MUST BE PREPARED IN ACCORDANCE WITH FED. R. APP. P. 27(D) AND SHOULD MEET THE TYPEFACE AND TYPE STYLE REQUIREMENTS OF FED. R. APP. P. 32(A)(5) AND (6).

General Standards For Ruling on Motions

5th Cir. R. 27 implements Fed. R. App. P. 27(b) and (c) and delegates to single judges and the clerk the authority to rule on specified motions, subject to review by the court. This I.O.P. provides the general sense of the court on the disposition of a variety of matters:

Briefs. The court expects that all briefs will be filed timely. Motions for extension of time to file briefs are disfavored and should be made only in exceptional instances where "good cause" exists. No extension is automatic. If an extension is granted, it will be for the very least amount of time necessary, and except in the most unusually compelling circumstances, will not exceed 30 days in a criminal case, or 40 days in a civil case.

Litigants seeking to file briefs after the due date set in the briefing letter should understand that the court generally will not permit the brief's filing "out of time". However even in the unusual case where out of time filing is authorized, a brief generally will not be filed out of time more than 30 days beyond the original due date in a criminal case, or 40 days in a civil case.

Motions for extension of time to file answers, replies to pending motions or to pay filing fees. If such motions are granted, extensions generally will not exceed 30 days.

Reinstatement of cases dismissed by the clerk. The court normally will not reinstate a case dismissed by the clerk under 5th Cir. R. 27.1.6 unless:

The deficiency which caused the dismissal has been remedied; and

The motion for reinstatement is made as soon as reasonably possible and in any event within 45 days of dismissal.

Motions Panels - Motions panels are drawn randomly from the active judges. These panels also operate as screening panels as discussed in the I.O.P. following 5th Cir. R. 34. The motions panels compositions are changed at the beginning of each court year to permit the judges to sit with other judges in screening and handling administrative motions.

Distribution

To Judges - Motions requiring judges' consideration are assigned in rotation to all active judges on a routing log.

The clerk assembles a complete set of the motion papers, and any other necessary material and submits them with a routing form to the initiating judge. In single judge matters the judge acts on the motion and returns it to the clerk with an appropriate order. For motions requiring panel action, a single set of papers is prepared, but the initiating judge transmits the file to the next judge with a recommendation. The second judge sends it on to the third judge, who returns the file and an appropriate order to the clerk.

EMERGENCY MOTIONS - THE CLERK IMMEDIATELY ASSIGNS THE MATTER TO THE NEXT INITIATING JUDGE IN ROTATION ON THE ADMINISTRATIVE ROUTING LOG AND TO THE PANEL MEMBERS. IF THE MATTER REQUIRES COUNSEL TO CONTACT THE INITIATING JUDGE OR PANEL MEMBERS PERSONALLY, THE CLERK WILL PROVIDE THE NAMES OF THE JUDGES ASSIGNED THE CASE, AFTER GETTING APPROVAL FROM THE INITIATING JUDGE.

THE MOTION PAPERS ARE DISTRIBUTED AS DESCRIBED ABOVE, EXCEPT THAT A COMPLETE SET, INCLUDING ANY DRAFT ORDER, IS FORWARDED TO ALL MEMBERS OF THE PANEL.

MOTIONS AFTER ASSIGNMENT TO CALENDAR - AFTER CASES ARE ASSIGNED TO THE ORAL ARGUMENT CALENDAR, MOTIONS ARE CIRCULATED TO THE HEARING PANEL RATHER THAN TO THE STANDARD MOTIONS PANELS. THE SENIOR ACTIVE JUDGE ON THE PANEL IS CONSIDERED THE INITIATING JUDGE. THE CLERK ENTERS ORDERS RESPONDING TO THE MOTIONS ON BEHALF OF THE PANEL UNTIL ENTRY OF THE OPINION.

POST-DECISION MOTIONS

EXTENSION OF TIME TO FILE PETITION FOR REHEARING OR LEAVE TO FILE OUT OF TIME - THE CLERK MAY ACT ON OR REFER TO THE COURT A TIMELY MOTION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR PANEL REHEARING OR FOR REHEARING EN BANC FOR A PERIOD NOT LONGER THAN 14 DAYS, 30 DAYS IF THE APPLICANT IS A PRISONER PROCEEDING PRO SE. MOTIONS FOR ADDITIONAL TIME BEYOND 14 OR 30 DAYS, OR TO FILE OUT OF TIME, ARE SUBMITTED TO THE WRITING JUDGE, UNLESS HE OR SHE IS A VISITING JUDGE. IN THAT EVENT THE MATTER IS REFERRED TO THE SENIOR ACTIVE JUDGE ON THE PANEL. IF THE SENIOR ACTIVE JUDGE DISSENTED, THE MATTER IS REFERRED TO THE OTHER ACTIVE JUDGE ON THE PANEL.

STAY OR RECALL OF MANDATE - THE CLERK OR A SINGLE JUDGE, AS APPROPRIATE, DECIDES A MOTION FOR STAY OR RECALL OF MANDATE PENDING ACTION ON A PETITION FOR WRIT OF CERTIORARI AND ROUTES AND DISPOSES OF IT IN THE SAME MANNER AS IN THE PRECEDING PARAGRAPH. (SEE 5TH CIR. R. 27.1.5, 27.2.7, AND 41).

MOTIONS TO AMEND, CORRECT, OR SETTLE THE JUDGMENT - THESE MOTIONS ARE REFERRED TO THE WRITING JUDGE WITH COPIES TO THE PANEL MEMBERS.

REMAND FROM SUPREME COURT OF THE UNITED STATES - REMANDS FROM THE SUPREME COURT OF THE UNITED STATES ARE SENT TO THE ORIGINAL PANEL FOR DISPOSITION WHEN THE SUPREME COURT'S JUDGMENT IS RECEIVED. COUNSEL DOES NOT NEED TO FILE A FORMAL MOTION.

5TH CIR. R. 28 *BRIEFS*

28.1 Briefs - Technical Requirements. *The technical requirements for permissible typefaces, paper size, line spacing, and length of briefs are found in FED. R. APP. P. and 5TH CIR. R. 32.*

28.2 Briefs - Contents.

28.2.1 Certificate of Interested Persons. The certificate of interested persons required by this rule is broader in scope than the corporate disclosure statement contemplated in FED. R. APP. P. 26.1. The certificate of interested persons provides the court with additional information concerning parties whose participation in a case may raise a recusal issue. A separate corporate disclosure statement is not required. Counsel and unrepresented parties will furnish a certificate for all private (non-governmental) parties, both appellants and appellees, which must be incorporated on the first page of each brief before the table of contents or index, and which must certify a complete list of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent corporations, or other legal entities who or which are financially interested in the outcome of the litigation. If a large group of persons or firms can be specified by a generic description, individual listing is not necessary. Each certificate must also list the names of opposing law firms and/or counsel in the case. The certificate must include all information called for by FED. R. APP. P. 26.1(a). Counsel and unrepresented parties must supplement their certificates of interested persons whenever the information that must be disclosed changes.

(a) Each certificate must list <u>all</u> persons known to counsel to be interested, on all sides of the case, whether or not represented by counsel furnishing the certificate. Counsel has the burden to ascertain and certify the true facts to the court.

(b) The certificate must be in the following form:

(1) Number and Style of Case;

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

(Here list names of all such persons and entities and identify their connection and interest.)

_____

*Attorney of record for*_____

28.2.2 Summary of Argument. In addition to the requirements of FED. R. APP. P. 28, the summary of argument should seldom exceed 2 and never 5 pages.

28.2.3 Record References. Every assertion in briefs regarding matter in the record must be supported by a reference to the page number of the original record where the matter is found.

28.2.4 Request for Oral Argument. Counsel for appellant must include in a preamble to appellant's principal brief a short statement why oral argument would be helpful, or a statement that appellant waives oral argument. Appellee's counsel must likewise include in appellee's brief a statement why oral argument is or is not needed. The court will give these statements due, though not controlling,

weight in determining whether to hold oral argument. See FED. R. APP. P. 34(a) and (f) and 5TH CIR. R. 34.2.

28.2.5 Statement of Jurisdiction. The jurisdictional statement required by FED. R. APP. P. 28(a)(4) should contain citations of authority when needed for clarity.

28.2.6 Standard of Review. As an aid to understanding FED. R. APP. P. 28(a)(9)(B), the following examples explain the "standard of review". Where the appeal is from an exercise of district court discretion, there should be a statement that the standard of review is whether the district court abused its discretion. The appropriate standard or scope of review for other contentions should be indicated similarly, e.g., that the district court erred in formulating or applying a rule of law; or that there is insufficient evidence to support a verdict; or that fact findings of the trial judge are clearly erroneous under FED. R. CIV. P. 52(a); or that there is a lack of substantial evidence in the record as a whole to support the factual findings of an administrative agency; or that the agency's action, findings, and conclusions should be held unlawful and set aside for the reasons set forth in 5 U.S.C. § 706(2). Appellee's brief need not state the standard of review unless appellee believes appellant has stated it incorrectly. The court requests that the standard of review be clearly identified in a separate heading before the discussion of the issues.

28.3 Brief - Order of Contents. *The order of contents of the brief is governed by FED. R. APP. P. 28 and this rule and shall be as follows:*

(a) Certificate of interested persons required by 5TH CIR. R. 28.2.1;

(b) Statement regarding oral argument required by 5TH CIR. R. 28.2.4 (See FED. R. APP. P. 34(a)(1);

(c) A table of contents, with page references (see FED. R. APP. P. 28 (a)(2));

(d) A table of authorities (see FED. R. APP. P. 28(a)(3));

(e) A jurisdictional statement as required by FED. R. App. P. 28(a)(4)(A) through (D);

(f) A statement of issues presented for review (see FED. R. APP. P. 28 (a)(5));

(g) A statement of the case (see FED. R. APP. P. 28(a)(6));

(h) A statement of facts relevant to the issues submitted for review (see FED. R. APP. P. 28(a)(7));

(i) A summary of the argument (see FED. R. APP. P. 28(a)(8));

(j) The argument (see FED. R. APP. P. 28(a)(9));

(k) A short conclusion stating the precise relief sought (see FED. R. APP. P. 28 (a)(10));

(l) A signature of counsel or a party as required by FED. R. APP. P. 32(d);

(m) A certificate of service in the form required by FED. R. APP. P. 25;

(n) A certificate of compliance if required by FED. R. APP. P. 32(a)(7) and 5TH CIR. R. 32.3.

28.4 Briefs in Cross-Appeals. *FED. R. APP. P. 28(h) determines which party is an appellant and which party is a cross-appellant. The appellee/cross-appellant should file a single brief containing both the argument as an appellant and the response to the opening brief. The appellant/cross-appellee then has 30 days to file a combined response and reply. The usual reply brief time then applies to the cross-appellant's reply.*

28.5 Supplemental Briefs. *The rules do not permit the filing of supplemental briefs without leave of court, but there are some occasions, particularly after a case is orally argued or submitted on the summary calendar, where the court will call for supplemental briefs on particular issues. Also, where intervening decisions or new developments should be brought to the court's attention, counsel may direct a letter, not a supplemental brief, to the clerk with citations and succinct comment. See FED. R. APP. P. 28(j). If a new case is not reported, copies of the decision should be appended. The letter must be filed in 4 copies, and served on opposing counsel.*

28.6 Signing the Brief. *See FED. R. APP. P. 32(d). The signature requirement is interpreted broadly, and the attorney of record may designate another person to sign the brief for him or her. Where counsel for a particular party reside in different locations, it is not necessary to incur the expense of sending the brief from one person to another for multiple signatures.*

28.7 Pro Se Briefs*. Unless specifically directed by court order, pro se motions, briefs or correspondence will not be filed if the party is represented by counsel.*

I.O.P. - MISCELLANEOUS BRIEF INFORMATION

(A) ACKNOWLEDGMENT OF BRIEFS - THE CLERK DOES NOT ACKNOWLEDGE THE FILING OF BRIEFS UNLESS COUNSEL OR A PARTY MAKES A SPECIAL REQUEST.

(B) SAMPLE BRIEFS AND RECORD EXCERPTS - UPON REQUEST, THE CLERK MAY LOAN SAMPLE BRIEFS AND RECORD EXCERPTS TO COUNSEL AND NON-INCARCERATED PRO SE LITIGANTS. BECAUSE PRO SE PRISONER BRIEFS ARE NOT HELD TO THE SAME RIGID STANDARDS AS OTHER BRIEFS, COPIES OF BRIEFS ARE GENERALLY NOT SENT TO PRISONERS. INSTEAD OTHER INFORMATIONAL MATERIAL MAY BE SENT. POSTAGE FEES MAY BE REQUIRED BEFORE THE MATERIALS ARE SENT.

(C) CHECKLIST AVAILABLE - A COPY OF THE CHECKLIST USED BY THE CLERK IN EXAMINING BRIEFS IS AVAILABLE ON REQUEST.

5TH CIR. R. 29 BRIEF OF AN AMICUS CURIAE

29.1 Time for Filing Motion. *Those wishing to file an amicus curiae brief should file a motion within 7 days after the filing of the principal brief of the party whose position the amicus brief will support.*

29.2 Contents and Form. *Briefs filed under this rule must comply with the applicable FED. R. APP. P. provisions and with 5TH CIR. R. 31 and 32. The brief must include a supplemental statement of interested parties, if necessary to fully disclose all those with an interest in the amicus brief. The brief should avoid the repetition of facts or legal arguments contained in the principal brief and should focus on points either not made or not adequately discussed in those briefs. Any non-conforming brief may be stricken, on motion or sua sponte.*

29.3 Length of Briefs. *See FED. R. APP. P.29(d).*

29.4 Denial of Amicus Curiae Status. *After a panel opinion is issued, amicus curiae status will not be permitted if the allowance would result in the disqualification of any member of the panel or of the en banc court.*

I.O.P. - SEE ALSO 5TH CIR. R. 31.2 .

5TH CIR. R. 30 APPENDIX TO THE BRIEFS

30.1 Records on Appeal/Record Excerpts/Appendix - Appeals from District Courts, the Tax Court, and Agencies. *Appeals from district courts and the Tax Court are decided on the original record on appeal (ROA). The clerk is authorized to require the party receiving the ROA to pay reasonable shipping costs as a condition of receiving the record. Moreover, counsel and unrepresented parties must review the ROA within 20 days of dispatch from the clerk's office and advise electronically or in writing both the appropriate District Court (or the Tax Court, if appropriate) and Fifth Circuit clerk's offices of any errors in, or omissions from, the ROA. Failure to comply may result in a denial of any requested extension of time to file a brief due to an alleged error in, or incomplete ROA. Record excerpts are filed in lieu of the appendix prescribed by FED. R. APP. P. 30. Petitions for review or enforcement of agency orders are governed by 5TH CIR. R. 30.2, but parties may be required to pay reasonable shipping costs, and are responsible for timely review of the record and the notification requirements set out above.*

30.1.1 Purpose. The record excerpts are intended primarily to assist the judges in making the screening decision on the need for oral argument and in preparing for oral argument. Counsel need excerpt only those parts of the record that will assist in these functions.

30.1.2 Filing. Four paper copies of excerpts of the district court record must accompany the appellant's brief, see 5TH CIR. R. 30.1.4 and 30.1.5. In addition, if the clerk permits electronic filing of the record excerpts, they may be filed on a computer diskette as specified in 5TH CIR. R. 31.1, or otherwise as the clerk may direct. The appellant must serve a paper copy of the excerpts on counsel for each of the parties separately represented and on any party proceeding pro se. If the party being served agrees in writing, service of a paper copy may be waived and made by such electronic means as the parties agree upon. The appellee may submit additional record excerpts with his or her brief. Four paper copies of any

additional record excerpts must be filed with the clerk. In addition, if the clerk permits, the additional record excerpts may be filed electronically (instead of in paper copy) as the clerk may direct.

30.1.3 Prisoner Petitions Without Representation by Counsel. Prisoners without counsel are not required to prepare and file record excerpts.

30.1.4 Mandatory Contents. The record excerpts must contain copies of the following portions of the district court record:

(a) The docket sheet;

(b) The notice of appeal;

(c) The indictment in criminal cases;

(d) The jury's verdict in all cases;

(e) The judgment or interlocutory order appealed;

(f) Any other orders or rulings sought to be reviewed;

(g) Any relevant magistrate judge's report and recommendation;

(h) Any supporting opinion or findings of fact and conclusions of law filed, or transcript pages of any such delivered orally; and

(i) A certificate of service complying with FED. R. APP. P. 25.

30.1.5 Optional Contents. The record excerpts may include those parts of the record, referred to in the briefs including:

(a) Essential pleadings or relevant portions thereof;

(b) The parts of the FED. R. CIV. P. 16(e) pretrial order relevant to any issue on appeal;

(c) Any jury instruction given or refused that presents an issue on appeal, together with any objection and the court's ruling, and any other relevant part of the jury charge;

(d) Findings and conclusions of the administrative law judge, if the appeal is of a court order reviewing an administrative agency determination;

(e) A copy of the relevant pages of the transcript when the appeal challenges the admission or exclusion of evidence or any other interlocutory ruling or order; and

(f) The relevant parts of any written exhibit (including affidavits) that present an issue on appeal.

30.1.6 Length. The optional contents of the record excerpts must not exceed 40 pages unless authorized by the court.

30.1.7 Form. The record excerpts must:

(a) Have a numbered table of contents, with citation to the record, beginning with the lower court docket sheet;

(b) Be on letter-size, light paper, reproduced by any process that results in a clear black image. Care must be taken to reproduce fully the document filing date column on the docket sheet;

(c) Be tabbed to correspond to the numbers assigned in the table of contents;

(d) Be bound to expose fully the filing date columns and allow the document to lie reasonably flat when opened. The record excerpts must have a durable white cover conforming to FED. R. APP. P. 32(a)(2), except that it shall be denominated "RECORD EXCERPTS."

The documents constituting the record excerpts do not need to be certified, but if the clerk's "filed" markings are either absent or not clearly legible, the accurate filing information must be typed or written thereon.

30.1.8 Nonconforming record excerpts. Record excerpts which do not conform to the requirements of this rule will be filed, but must be corrected within the time directed by the clerk. Failure to file corrected record excerpts may result in their being stricken and imposition of sanctions, under 5TH CIR. R. 32.6.

30.2 Appendix - Agency Review Proceedings. *Petitions for review or enforcement of orders of an administrative agency, board, commission or officer must proceed on the original record on review, without a FED. R. APP. P. 30 required appendix. If a party requests use of the original record, the clerk may require payment of reasonable shipping costs, and the party is responsible for timely review and notification to the agency and the Fifth Circuit clerk's office of any record deficiencies, see 5TH CIR. R. 30.1.*

(a) If a certified list of documents comprising the record is filed in lieu of the formal record, petitioner must prepare and file with the court and serve on the agency, board, or commission a copy of the portions of the record relied upon by the parties in their briefs. The list of documents must be suitably covered, numbered, and indexed and filed within 21 days of the filing of respondent's brief.

(b) Except in review proceedings covered by 5TH CIR. R. 15.3, at the time of filing petitioner's brief, petitioner must file separately 4 copies of any order sought to be reviewed and any supporting opinion, findings of fact, or conclusions of law filed by the agency, board, commission, or officer.

5TH CIR. R. 31 FILING AND SERVICE OF A BRIEF

31.1 Briefs - Number of Copies; Computer Generated Briefs. *Only 7 paper copies of briefs need be filed. Where a party is represented by counsel and generates his or her brief by computer, the party also must submit an electronic version of the brief to the court. The filing party must serve unrepresented parties and counsel for separately represented parties in accordance with FED. R. APP. P. 31(b), and also must serve an electronic version of the brief on each party separately represented. However, the parties may agree in writing to waive service of paper copies of the brief and to be served with an electronic copy only. Electronic service may be in a form agreed to in writing by the parties, or by the same means as submitted to the court. The presently accepted form for submitting the court's electronic version is on a 3.5 inch diskette, but the clerk's office later may elect to allow submission on other physical media, e.g. CD, etc., or by electronic transmission, under criteria to be developed.*

The electronic version must:

be prepared in a single Portable Document Format (PDF) file. (Briefs scanned into PDF are not acceptable);

contain nothing other than the brief;

have as the first page of the electronic file a brief cover page as required by FED. R. APP. P. 32(a)(2).

If submitted on a diskette, or other later authorized physical media, the electronic version must have a label containing the case name and docket number, and identifying the brief as the appellant's, appellee's, etc.

The proof of service must comply with FED. R. APP. P. 25(d)(1)(B) & (2).

31.2 Briefs - Time for Filing Briefs of Intervenors or Amicus Curiae. *The time for filing the brief of the intervenor or amicus is extended until 7 days after the filing of the principal brief of the party supported by the intervenor or amicus.*

31.3 Briefs - Time for Mailing or Delivery to a Commercial Carrier. *The appellant must send his or her brief to the clerk not later than 40 days after the date of the briefing notice. Pursuant to FED. R. APP. P. 26(c), the appellee has 33 days from the appellant's date of the certificate of service to place the appellee's brief in the mail, file it with the clerk electronically where permitted, or to give it to a third-party commercial carrier for delivery within 3 calendar days. This rule may not be combined with the additional time provisions of FED. R. APP. P. 26(c) to give the appellee 36 days to file a brief. The certificate of service required by FED. R. APP. P. 25(d) is placed in the brief as specified in 5TH CIR. R.*

28.3, and must be dated. See 5TH CIR. R. 39.2 for limitations on recovery of certain mailing and commercial delivery costs.

31.4 Briefs - Time for Filing.

31.4.1 General Provisions. The court expects briefs to be filed timely and without extensions in the vast majority of cases. No extensions are automatic, even where the request is unopposed. Any requests for extensions should be made sparingly. No extension can be granted without good cause shown as required by FED. R. APP. P. 26(b), or without meeting the additional requirements contained in the 5TH CIR. R.

(a) A request for extension should be made as soon as it is reasonably possible to foresee the need for the extension. The clerk must receive a request for extension at least 7 days before the due date, unless the movant demonstrates, in detail, that the facts that form the basis of the motion either did not exist earlier or were not and with due diligence could not have been known earlier.

(b) As specified in 5TH CIR. R. 27.1, the movant must indicate that all other parties have been contacted and whether the motion is opposed. Movants should request only as much time as is absolutely needed. The pendency of a motion for extension does not toll the time for compliance.

31.4.2 Grounds for Extensions. As justification for extensions, generalities, such as that the purpose of the motion is not for delay or that counsel is too busy, are not sufficient. Grounds that may merit consideration for extensions are, without limitation, the following, which must be set forth if claimed as a reason in any motion for an extension beyond 30 days:

(a) Engagement of counsel in other litigation, provided such litigation is identified by caption, number, and court, and there is set forth:

(1) A description of any effort taken to defer the other litigation and of any ruling thereon;

(2) An explanation of why other litigation should receive priority over the case at hand; and

(3) Other relevant circumstances, including why other associated counsel cannot prepare the brief or relieve the movant's counsel of the other litigation.

(b) The matter is so complex that an adequate brief cannot reasonably be prepared when due.

(c) Extreme hardship will result unless an extension is granted, in which event the nature of the hardship must be set forth in detail.

31.4.3 Levels of Extensions. There are two levels of extensions: a Level 1 extension of 1-30 days from the original due date; and a Level 2 extension of more than 30 days from the original due date.

31.4.3.1 Level 1 Extensions. The clerk is authorized to act on or refer to the court Level 1 extensions. The court prefers that an unopposed request be made by telephone, but it may be by written motion or letter. When making the request, the movant must explain what good cause exists for the extension. If the extension is granted by telephone, the movant shall immediately send a confirming letter to the clerk, with copies to all parties.

An opposed request for a Level 1 extension must be made by written motion setting forth why there is good cause. The motion must state the initial due date, whether any other extension has been granted, the length of the requested extension, and which parties have expressed opposition.

31.4.3.2 Level 2 Extensions. The clerk is authorized to act on or refer to the court Level 2 extensions. The request must be made by written motion, with copies to all parties, stating the initial due date, whether any other extension has been granted, the length of the requested extension, and whether the motion is opposed.

More than ordinary good cause is required for a Level 2 extension, and Level 2 extensions will be granted only under the most extraordinary of circumstances. The movant must demonstrate diligence and substantial need and must show in detail what special circumstances exist that make a Level 1 extension insufficient.

31.4.4 Extensions for Reply Briefs. The court greatly disfavors all extensions of time for filing reply briefs. The court assumes that the parties have had ample opportunity to present their arguments in their initial briefs and that extensions for reply briefs only delay submission of the case to the court.

I.O.P. - FOR THE 12 MONTH PERIOD ENDED JUNE 30, 2004, THE COURT RECEIVED 3,819 MOTIONS REQUESTING EXTENSIONS OF TIME TO FILE BRIEFS, OR TO FILE BRIEFS OUT OF TIME, WHICH ARE CONSIDERED EXTENSION REQUESTS. THE MAJORITY OF THESE MOTIONS WERE BY COUNSEL, AND FREQUENTLY WERE MADE IN DIRECT CRIMINAL APPEALS WHICH HAVE THE LONGEST AVERAGE PROCESSING TIME FROM FILING THE NOTICE OF APPEAL TO FILING THE LAST BRIEF. TO ASSURE THAT THIS COURT DECIDES CASES MORE EXPEDITIOUSLY, THE COURT'S GOALS ARE TO: 1) REDUCE THE NUMBER OF MOTIONS TO EXTEND TIME TO FILE BRIEFS; AND 2) TO SHORTEN THE AMOUNT OF TIME GRANTED. IN GENERAL AND ABSENT THE MOST COMPELLING OF REASONS, NO MORE THAN 30 DAYS EXTENSION OF TIME WILL BE GRANTED IN CRIMINAL CASES AND NO MORE THAN 40 DAYS EXTENSION OF TIME WILL BE GRANTED IN CIVIL CASES.

5TH CIR. R. 32 *FORM OF BRIEFS, THE APPENDIX AND OTHER PAPERS*

32.1 Typeface. *Must comply with FED. R. APP. P. 32(a)(5), except that footnotes may be 12 point or larger in proportionally spaced typeface, or 12½ characters per inch or larger in monospaced typeface.*

32.2 Type Volume Limitations. *See FED. R. APP. P. 32(a)(7)(B)(iii). The certificate of interested parties also does not count toward the limitation. A "Brief for Appellee/Cross-Appellant" and*

a "Brief for Cross Appellee and Reply Brief for Appellant" are considered principal briefs for purposes of the page length and word-volume length limitations.

32.3 Certificate of Compliance. *See Form 6 in the Appendix of Forms to the FED. R. APP. P. A material misrepresentation in the certificate of compliance may result in striking the brief and in sanctions against the person signing the brief.*

32.4 Motions for Extra-Length Briefs. *A motion to file a brief in excess of the page length or word-volume limitations must be filed at least 7 days in advance of the brief's due date. The court looks upon such motions with great disfavor and will grant them only for extraordinary and compelling reasons. If a motion to file an extra-length brief is submitted, a draft copy of the brief must be submitted with the motion.*

32.5 Rejection of Briefs and Record Excerpts. *If all copies of briefs and record excerpts do not conform to 5TH CIR. R. 28 and 30 and all provisions of FED. R. APP. P. 32, the clerk will file the briefs and record excerpts, but is authorized to return all nonconforming copies. An extension of 10 days is allowed for resubmission in a conforming format. The court may strike briefs and record excerpts if the party fails to submit conforming briefs or record excerpts within 10 days. If at any time the clerk believes the non-conformance is egregious or in bad faith, the clerk, in the alternative to filing the nonconforming matters, may submit them to a single judge, who can reject them and direct that they be returned unfiled. Failure to submit conforming briefs or record excerpts may result in imposition of sanctions.*

32.6 Color of Covers of Briefs in Cross-Appeals.

When the appellee has filed a cross appeal the brief color cover is as follows:

Brief for Appellant - Blue

Brief for Appellee-Cross-Appellant - Red

Brief for Cross-Appellee and Reply Brief for Appellant - Red

Reply Brief of Cross-Appellant - Gray

I.O.P. - FORM OF RECORD EXCERPTS/APPENDIX - SEE 5TH CIR. R. 30.

I.O.P. - APPEAL CONFERENCES - SEE 5TH CIR. R. 15.3.5.

5TH CIR R. 34 ORAL ARGUMENT

34.1 Docket Control. *In the interest of docket control, the chief judge may from time to time appoint a panel or panels to review pending cases for appropriate assignment or disposition under this rule or any other rule of this court.*

34.2 Oral Arguments. *Oral argument is governed by FED. R. APP. P. 34. Cases not set for oral argument are placed on the summary calendar for decision. The clerk will calendar the oral argument cases based upon the court's calendaring priorities. Counsel for each party must present oral argument*

unless excused by the court for good cause. The oral argument docket will show the time the court has allotted for each argument. If counsel for all parties indicate that oral argument is not necessary under paragraph .3 of this rule, the case will be governed by FED. R. APP. P. 34(f).

34.3 Submission Without Argument. *A party desiring to waive oral argument in a case set for oral argument must file a motion to waive argument at least 7 days before the date set for hearing.*

34.4 Number of Counsel To Be Heard. *Not more than 2 counsel will be heard for each party on the argument of a case, and the time allowed may be apportioned between counsel in their discretion.*

34.5 Expediting Appeals. *The court may, on its own motion or for good cause on motion of either party, advance any case for hearing, and prescribe an abbreviated briefing schedule.*

34.6 Continuance of Hearing. *After a case has been set for hearing, the parties or counsel may not stipulate to delay the hearing. Only the court may delay argument for good cause shown. Engagement of counsel in other courts ordinarily is not considered good cause.*

34.7 Recording of Oral Arguments. *No cameras, tape recorders, or other equipment designed for the recording or transmission of visual images or sound may be present or used during oral argument. However, with the advance approval of the presiding judge, counsel may arrange, at their own expense, for a qualified court reporter to record and transcribe oral argument. If it is the court reporter's usual practice, the reporter may make and use a sound recording for the sole purpose of preparing an accurate transcript. The reporter then must immediately destroy or erase the recording without making it available to counsel, a party, or any other person for any purpose. The court records oral argument for its exclusive use and does not make the tapes, or copies or transcripts of the recording available to counsel, the parties, or any other person.*

34.8 Criminal Justice Act Cases. *The court expects court-appointed counsel to present oral argument. An associate attorney not appointed under the act may present argument only under the most pressing and unusual circumstances, and upon the court's advance authorization.*

34.9 Checking In with Clerk's Office. *On the day of hearing counsel must check in with the clerk 30 minutes before court convenes to confirm the name of the attorney or attorneys who will present argument for each party and how the argument time will be divided between opening and rebuttal. All counsel in the fourth and fifth cases on the docket heard in New Orleans may check in by telephone, but must report in person to the clerk's office within one hour after court convenes. On the last day of a New Orleans session, all attorneys must report in person to the clerk's office 30 minutes before court convenes.*

34.10 Submission Without Argument. *When a case is placed on the oral argument calendar, a judge of the court has determined that oral argument would be helpful. Therefore, requests of the parties to waive oral argument are not looked upon with favor, and counsel may be excused only by the court for good cause. See 5TH CIR. R. 34.3.*

If appellant fails to appear in a criminal appeal from conviction, the court will not hear argument from the United States.

34.11 Time for Oral Argument. *The time allowed for oral argument is indicated on the printed calendar. Most cases are allowed 20 minutes to the side. The word "side" refers to parties in their position on appeal. Where in doubt, consult the clerk's office.*

34.12 Additional Time for Oral Argument. *Additional time for oral argument is sparingly permitted. Requests for additional time should be set forth in a motion or letter to the clerk filed well in advance of the oral argument.*

34.13 Calling the Calendar. *The court usually does not call the calendar unless there are special problems requiring attention. The court hears the cases in the order they appear on the calendar.*

I.O.P. - SCREENING - SCREENING IS THE NAME GIVEN TO THE METHOD USED BY THE COURT TO DETERMINE WHETHER CASES SHOULD BE ARGUED ORALLY OR DECIDED ON BRIEFS ONLY. THIS IS DONE UNDER FED. R. APP. P. AND 5TH CIR. R. 34.

(A) THE JUDGES OF THE COURT SCREEN CASES WITH ASSISTANCE FROM THE STAFF ATTORNEY. WHEN THE LAST BRIEF IS FILED, A CASE IS GENERALLY SENT TO THE STAFF ATTORNEY FOR PRESCREENING CLASSIFICATION. IF THE STAFF ATTORNEY CONCLUDES THAT THE CASE DOES NOT WARRANT ORAL ARGUMENT, A BRIEF MEMORANDUM MAY BE PREPARED AND THE CASE RETURNED TO THE CLERK. THE CLERK THEN ROUTES THE CASE TO 1 OF THE COURT'S JUDGES, SELECTED IN ROTATION. IF THAT JUDGE AGREES THAT THE CASE DOES NOT WARRANT ORAL ARGUMENT, THE BRIEFS, TOGETHER WITH A PROPOSED OPINION, ARE FORWARDED TO THE 2 OTHER JUDGES ON THE SCREENING PANEL. IF ANY PARTY REQUESTS ORAL ARGUMENT, ALL PANEL JUDGES MUST CONCUR THAT THE CASE DOES NOT WARRANT ORAL ARGUMENT, AND ALSO IN THE PANEL OPINION AS A PROPER DISPOSITION WITHOUT ANY SPECIAL CONCURRENCE OR DISSENT. IF NO PARTY REQUESTS ORAL ARGUMENT, ALL PANEL JUDGES MUST CONCUR THAT THE CASE DOES NOT WARRANT ORAL ARGUMENT. HOWEVER, ABSENT A PARTY'S REQUEST FOR ORAL ARGUMENT, SUMMARY DISPOSITION MAY INCLUDE A CONCURRENCE OR A DISSENT BY PANEL MEMBERS.

(B) IF THE STAFF ATTORNEY CONCLUDES THAT ORAL ARGUMENT IS REQUIRED, THE CASE IS SENT TO AN ACTIVE JUDGE FOR SCREENING. IF THE SCREENING JUDGE AGREES, THE CASE IS PLACED ON THE NEXT APPROPRIATE CALENDAR, CONSISTENT WITH THE COURT'S CALENDARING PRIORITIES. IF THE SCREENING JUDGE DISAGREES WITH THE RECOMMENDATION FOR ORAL ARGUMENT, THAT JUDGE'S SCREENING PANEL DISPOSES OF THE CASE UNDER THE SUMMARY CALENDAR PROCEDURE.

DECISION WITHOUT ORAL ARGUMENT - WHEN ALL PANEL MEMBERS AGREE THAT ORAL ARGUMENT OF A CASE IS NOT NEEDED, THEY ADVISE THE CLERK THE CASE HAS BEEN PLACED ON THE SUMMARY CALENDAR. THE COURT'S DECISION USUALLY ACCOMPANIES THE NOTICE TO THE CLERK.

COURT YEAR SCHEDULE - THE CLERK PREPARES A PROPOSED COURT SCHEDULE FOR AN ENTIRE YEAR WHICH IS APPROVED BY THE SCHEDULING PROCTOR AND CHIEF JUDGE OF THE COURT. THE COURT SCHEDULE DOES NOT CONSIDER WHAT SPECIFIC CASES ARE TO BE HEARD, BUT ONLY SETS THE WEEKS OF COURT IN RELATION TO THE PROBABLE VOLUME OF CASES AND JUDGE POWER AVAILABILITY FOR THE YEAR.

JUDGE ASSIGNMENTS

PANEL SELECTION PROCEDURE - BASED ON THE NUMBER OF WEEKS EACH ACTIVE JUDGE SITS AND THE NUMBER OF SITTINGS AVAILABLE FROM THE COURT'S SENIOR JUDGES, AND VISITING CIRCUIT OR DISTRICT JUDGES, THE SCHEDULING PROCTOR AND CLERK CREATE PANELS OF JUDGES FOR THE SESSIONS OF THE COURT FOR THE ENTIRE COURT YEAR. THE JUDGES ARE SCHEDULED TO AVOID REPETITIVE SCHEDULING OF PANELS COMPOSED OF THE SAME MEMBERS.

SEPARATION OF ASSIGNMENT OF JUDGES AND CALENDARING OF CASES - THE JUDGE ASSIGNMENTS ARE MADE AVAILABLE ONLY TO THE JUDGES FOR THEIR ADVANCE PLANNING OF THEIR WORKLOAD FOR THE FORTHCOMING COURT YEAR. TO INSURE COMPLETE OBJECTIVITY IN THE ASSIGNMENT OF JUDGES AND THE CALENDARING OF CASES, THE TWO FUNCTIONS OF (1) JUDGE ASSIGNMENTS TO PANELS AND (2) CALENDARING OF CASES ARE CAREFULLY SEPARATED.

PREPARATION AND PUBLISHING CALENDARS

GENERAL - THE CLERK PREPARES CALENDARS OF CASES UNDER CALENDARING GUIDELINES ESTABLISHED BY THE COURT. CALENDARS ARE PREPARED FOR THE NUMBER OF SESSIONS (USUALLY BETWEEN 3 AND 5) SCHEDULED FOR A MONTH. INFORMATION ABOUT THE NAMES OF THE PANEL MEMBERS IS NOT DISCLOSED WITHIN THE CLERK'S OFFICE UNTIL THE CALENDARS OF CASES FOR THE MONTH ARE ACTUALLY PREPARED SO THAT BRIEFS AND OTHER MATERIALS CAN BE DISTRIBUTED.

CALENDARING BY CASE TYPE - THE CLERK BALANCES THE CALENDARS BY DIVIDING THE CASES EVENLY AMONG THE PANELS BY CASE TYPE SO THAT EACH PANEL FOR A PARTICULAR MONTH HAS MORE OR LESS AN EQUAL NUMBER OF DIFFERENT TYPES OF LITIGATION FOR CONSIDERATION.

PREFERENCE CASES - THE CATEGORIES OF CASES LISTED IN 5TH CIR. R. 47.7 ARE GIVEN PREFERENCE IN PROCESSING AND DISPOSITION. TO ASSIST THE CLERK IN IMPLEMENTING THIS RULE, ANY PARTY TO A CIVIL APPEAL OR REVIEW PROCEEDING REQUIRING PRIORITY STATUS SHOULD NOTIFY THE CLERK AND CITE THE STATUTORY SUPPORT FOR THE PREFERENCE.

NON-PREFERENCE CASES - ALL OTHER CASES ARE CALENDARED FOR HEARING IN ACCORDANCE WITH THE COURT'S "FIRST-IN FIRST-OUT" RULE. UNLESS THE COURT ASSIGNS SPECIAL PRIORITY THE OLDEST CASES IN POINT OF TIME OF AVAILABILITY OF BRIEFS ARE ORDINARILY CALENDARED FIRST FOR HEARING.

CALENDARING FOR CONVENIENCE OF COUNSEL - FOR THE NEW ORLEANS SESSIONS, CASES WITH NON-LOCAL LAWYERS ARE SCHEDULED IN THE FIRST POSITIONS ON THE CALENDAR WHENEVER POSSIBLE FOR THEIR CONVENIENCE IN MAKING DEPARTURE ACCOMMODATIONS.

NUMBER OF CASES ASSIGNED - UNLESS SPECIAL PROVISION IS MADE, A REGULAR SESSION OF A PANEL OF THE COURT WILL HEAR 5 CASES PER DAY FOR 4 DAYS, MONDAY THROUGH THURSDAY.

ADVANCE NOTICE - THE COURT SEEKS TO GIVE COUNSEL 60 DAYS ADVANCE NOTICE OF CASES SET FOR ORAL ARGUMENT.

FORWARDING BRIEFS TO JUDGES - IMMEDIATELY AFTER FORMALLY ISSUING THE CALENDAR THE CLERK SENDS THE PANEL MEMBERS COPIES OF THE BRIEFS FOR THE CASES SET ON THE CALENDAR.

PRE-ARGUMENT PREPARATION - THE JUDGES INVARIABLY READ ALL BRIEFS PRIOR TO ORAL ARGUMENT.

IDENTITY OF PANEL - THE CLERK MAY NOT DISCLOSE THE NAMES OF THE PANEL MEMBERS FOR A PARTICULAR SESSION UNTIL 1 WEEK IN ADVANCE OF THE SESSION.

ORAL ARGUMENT

PRESENTING ARGUMENT - COUNSEL SHOULD PREPARE THEIR ORAL ARGUMENTS KNOWING THE JUDGES HAVE ALREADY STUDIED THE BRIEFS. READING FROM BRIEFS, DECISIONS, OR THE RECORD IS NOT PERMITTED EXCEPT IN UNUSUAL CIRCUMSTANCES. COUNSEL SHOULD BE PREPARED TO ANSWER THE COURT'S QUESTIONS. THE COURT WILL CONSIDER A MOTION TO EXTEND THE TIME ALLOTTED FOR ARGUMENT IF THE COURT'S QUESTIONS PREVENT COMPLETION OF COUNSEL'S ARGUMENT.

LIGHTING SIGNAL PROCEDURE - THE COURTROOM DEPUTY WILL KEEP TRACK OF THE TIME USING LIGHTING SIGNALS:

(A) APPELLANT'S ARGUMENT - A GREEN LIGHT SIGNALS THE BEGINNING OF THE OPENING ARGUMENT OF APPELLANT. TWO MINUTES BEFORE EXPIRATION OF THE TIME ALLOWED FOR OPENING ARGUMENT, THE GREEN LIGHT GOES OFF AND A YELLOW LIGHT COMES ON. WHEN THE TIME RESERVED FOR OPENING ARGUMENT EXPIRES, THE YELLOW LIGHT GOES OFF AND A RED LIGHT COMES ON. IF COUNSEL PROCEEDS AFTER THE RED LIGHT, TIME WILL BE DEDUCTED FROM THE REBUTTAL PERIOD.

(B) APPELLEE'S ARGUMENT - THE SAME PROCEDURE AS OUTLINED ABOVE IS USED.

(C) APPELLANT'S REBUTTAL - A GREEN LIGHT SIGNALS COMMENCEMENT OF TIME; A RED LIGHT COMES ON WHEN TIME EXPIRES. NO YELLOW LIGHT IS USED.

CASE CONFERENCES AND DESIGNATION OF WRITING JUDGE - THE PANEL HEARING THE ARGUMENTS USUALLY CONFERS ON THE CASES AT THE CONCLUSION OF EACH DAY'S ARGUMENTS. A TENTATIVE DECISION IS REACHED AND THE PRESIDING JUDGE ASSIGNS RESPONSIBILITY FOR OPINION WRITING. THERE IS NO PRE-ARGUMENT ASSIGNMENT OF OPINION WRITING. JUDGES DO NOT SPECIALIZE. ASSIGNMENTS ARE MADE TO EQUALIZE THE WORKLOAD OF THE ENTIRE SESSION.

5TH CIR. R. 35 *DETERMINATION OF CAUSES BY THE COURT EN BANC*

35.1 Caution. *Counsel are reminded that in every case the duty of counsel is fully discharged without filing a petition for rehearing en banc unless the case meets the rigid standards of FED. R. APP. P. 35(a). As is noted in FED. R. APP. P. 35, en banc hearing or rehearing is not favored. Among the reasons is that each request for en banc consideration must be studied by every active judge of the court and is a serious call on limited judicial resources. Counsel have a duty to the court commensurate with that owed their clients to read with attention and observe with restraint the standards of FED. R. APP. P. 35(b)(1). The court takes the view that, given the extraordinary nature of petitions for en banc consideration, it is fully justified in imposing sanctions on its own initiative under, inter alia, FED. R. APP. P. 38 and 28 U.S.C. § 1927, upon the person who signed the petitions, the represented party, or both, for manifest abuse of the procedure.*

35.2 Form of Petition. *Twenty copies of every petition for en banc consideration, whether upon initial hearing or rehearing, must be filed. The petition must not be incorporated in the petition for rehearing before the panel, if one is filed, but must be complete in itself. In no case shall a petition for en banc consideration adopt by reference any matter from the petition for panel rehearing or from any other briefs or motions in the case. A petition for en banc consideration must contain the following items, in order:*

35.2.1 Certificate of interested persons required for briefs by 5TH CIR. R. 28.2.1.

35.2.2 If the party petitioning for en banc consideration is represented by counsel, a statement as set forth in FED. R. APP. P. 35(b)(1).

35.2.3 Table of contents and authorities.

35.2.4 Statement of the issue or issues asserted to merit en banc consideration. It will rarely occur that these will be the same as those appropriate for panel rehearing. A petition for en banc consideration must be limited to the circumstances enumerated in FED. R. APP. P. 35(a).

35.2.5 Statement of the course of proceedings and disposition of the case.

35.2.6 Statement of any facts necessary to the argument of the issues.

35.2.7 Argument and authorities. These shall concern only the issues required by paragraph (.2.4) hereof and shall address specifically, not only their merit, but why they are contended to be worthy of en banc consideration.

35.2.8 Conclusion.

35.2.9 Certificate of service.

35.2.10 A copy of the opinion or order sought to be reviewed. The opinion or order shall be bound with the petition and shall not be marked or annotated.

35.3 Response to Petition. *No response to a petition for en banc consideration will be received unless requested by the court.*

35.4 Time and Form - Extensions. *Any petition for rehearing en banc must be received in the clerk's office within the time specified in FED. R. APP. P. 40. Counsel should not request extensions of time except for the most compelling reasons.*

35.5 Length. *See FED. R. APP. P. 35(b)(2).*

35.6 Determination of Causes En Banc and Composition of En Banc Court. *A cause shall be heard or reheard en banc when it meets the criteria for en banc set out in FED. R. APP. P. 35(a). For purposes of en banc voting under 28 U.S.C. § 46(c), the term "majority" is defined as a majority of all judges of the court in regular active service presently appointed to office. Judges in regular active service who are disqualified for any reason or who cannot participate in the decision of an en banc case nevertheless shall be counted as judges in regular active service.*

The en banc court shall be composed of all active judges of the court plus any senior judge of the court who participated in the panel decision who elects to participate in the en banc consideration. This election is to be communicated timely to the chief judge and clerk. Any judge participating in an en banc poll, hearing, or rehearing while in regular active service who subsequently takes senior status may elect to continue participating in the final resolution of the case.

I.O.P.

PETITION FOR REHEARING EN BANC

EXTRAORDINARY NATURE OF PETITIONS FOR REHEARING EN BANC - A PETITION FOR REHEARING EN BANC IS AN EXTRAORDINARY PROCEDURE THAT IS INTENDED TO BRING TO THE ATTENTION OF THE ENTIRE COURT AN ERROR OF EXCEPTIONAL PUBLIC IMPORTANCE OR AN OPINION THAT DIRECTLY CONFLICTS WITH PRIOR SUPREME COURT, FIFTH CIRCUIT OR STATE LAW PRECEDENT, SUBJECT TO THE FOLLOWING: ALLEGED ERRORS IN THE FACTS OF THE CASE (INCLUDING SUFFICIENCY OF THE EVIDENCE) OR IN THE APPLICATION OF CORRECT PRECEDENT TO THE FACTS OF THE CASE ARE GENERALLY MATTERS FOR PANEL REHEARING BUT NOT FOR REHEARING EN BANC.

THE MOST ABUSED PREROGATIVE - PETITIONS FOR REHEARING EN BANC ARE THE MOST ABUSED PREROGATIVE OF APPELLATE ADVOCATES IN THE FIFTH CIRCUIT. FEWER THAN 1% OF THE CASES DECIDED BY THE COURT ON THE MERITS ARE REHEARD EN BANC; AND FREQUENTLY THOSE REHEARINGS GRANTED RESULT FROM A REQUEST FOR EN BANC RECONSIDERATION BY A JUDGE OF THE COURT RATHER THAN A PETITION BY THE PARTIES.

Handling of Petition by the Judges

Panel Has Control - Although each panel judge and every active judge receives a copy of the petition for rehearing en banc, the filing of a petition for rehearing en banc does not take the case out of the control of the panel deciding the case. A petition for rehearing en banc is treated as a petition for rehearing by the panel if no petition is filed. The panel may grant rehearing without action by the full court.

Requesting a Poll - Within 10 calendar days of the filing of the petition, any active judge of the court or any member of the panel rendering the decision, who desires that the case be reheard en banc, may notify the writing judge (the senior active Fifth Circuit judge if the writing judge is a non-active member) to this effect on or before the date shown on the clerk's form that transmits the petition. This notification is also notice that if the panel declines to grant rehearing, an en banc poll is desired.

If the panel decides not to grant the rehearing after such notice, it notifies the chief judge, who then polls the court by written ballot on whether en banc rehearing should be granted.

Requesting a Poll on Court's Own Motion - Any active member of the court or any member of the panel rendering the decision may request a poll of the active members of the court whether rehearing en banc should be granted, whether or not a party filed a petition for rehearing en banc. A requesting judge ordinarily sends a letter to the chief judge with copies to the other active judges of the court and any other panel member.

Polling the Court - When a request to poll the court is made, each active judge of the court casts a ballot and sends a copy to all other active judges of the court and any senior Fifth Circuit judge who is a panel member. The ballot indicates whether the judge voting desires oral argument if en banc is granted.

Negative Poll - If the vote is unfavorable to the grant of en banc consideration, the chief judge advises the writing judge. The panel originally hearing the case then enters an appropriate order.

Affirmative Poll - If a majority of the judges in regular active service vote for en banc hearing or rehearing, the chief judge instructs the clerk as to an appropriate order. The order indicates a rehearing en banc with or without oral argument has been granted, and specifies a briefing schedule for filing of additional briefs. The appellant's brief will have a blue cover; the appellee's will have a red cover.

Every party must then furnish to the clerk 20 additional copies of every brief the party previously filed.

No Poll Request - If the specified time for requesting a poll has expired and the writing judge of the panel has not received a request from any active member of the court,

OR OTHER PANEL MEMBER, THE JUDGE MAY TAKE SUCH ACTION DEEMED APPROPRIATE ON THE PETITION. HOWEVER, IN THE ORDER DISPOSING OF THE CASE AND THE PETITION, THE PANEL'S ORDER DENYING THE PETITION FOR REHEARING EN BANC MUST SHOW NO POLL WAS REQUESTED.

CAPITAL CASES - CONSISTENT WITH LONG ESTABLISHED LEGAL PRINCIPLE AND UNIFORMLY FOLLOWED PRACTICE, THE FILING OF A PETITION FOR REHEARING (OR HEARING) EN BANC DOES NOT CONSTITUTE OR OPERATE AS A STAY OF EXECUTION AND DOES NOT PRECLUDE CARRYING OUT AN EXECUTION.

TIMELY PETITIONS FOR REHEARING (OR HEARING) EN BANC WHICH ARE FILED IN A CAPITAL CASE WHILE A SCHEDULED EXECUTION DATE IS PENDING AND LESS THAN 22 CALENDAR DAYS BEFORE THE SCHEDULED DATE WILL BE PROCESSED AND DISTRIBUTED IN THE MANNER PRESCRIBED BY THE CHIEF JUDGE OR DELEGEE. THE CHIEF JUDGE OR DELEGEE MAY ORDER EXPEDITED CONSIDERATION THEREOF AND SET A TIME LIMIT FOR EACH JUDGE ELIGIBLE TO VOTE THEREON TO ADVISE THE CHIEF JUDGE OR DELEGEE WHETHER TO CALL FOR A POLL AND WHETHER (IF A POLL IS OR WERE TO BE TIMELY REQUESTED BY ANY JUDGE) THE JUDGE WOULD VOTE FOR OR AGAINST REHEARING (OR HEARING) EN BANC, AND THE PETITION FOR REHEARING (OR HEARING) EN BANC WILL BE DISPOSED OF ACCORDINGLY. IF NO POLL IS TIMELY REQUESTED, OR IF A POLL RESULTS IN NO REHEARING (OR HEARING) EN BANC, THE PANEL MAY ENTER AN ORDER DENYING REHEARING (OR HEARING) EN BANC. IF A POLL RESULTS IN A GRANT OF REHEARING (OR HEARING) EN BANC, THE CHIEF JUDGE, OR DELEGEE, WILL ENTER AN ORDER STAYING THE EXECUTION PENDING FURTHER ORDER OF THE COURT.

5TH CIR. R. 39 *COSTS*

39.1 Taxable Rates. *The cost of reproducing necessary copies of the briefs, appendices, or record excerpts shall be taxed at a rate not higher than $0.25 per page, including cover, index, and internal pages, for any form of reproduction costs. The cost of the binding required by 5TH CIR. R. 32.2.3 that mandates that briefs must lie reasonably flat when open shall be a taxable cost but not limited to the foregoing rate. This rate is intended to approximate the current cost of the most economical acceptable method of reproduction generally available; and the clerk shall, at reasonable intervals, examine and review it to reflect current rates. Taxable costs will be authorized for up to 15 copies for a brief and 10 copies of an appendix or record excerpts, unless the clerk gives advance approval for additional copies.*

39.2 Nonrecovery of Mailing and Commercial Delivery Service Costs. *Mailing and commercial delivery fees incurred in transmitting briefs are not recoverable as taxable costs.*

39.3 Time for Filing Bills of Costs. *The clerk must receive bills of costs and any objections within the times set forth in FED. R. APP. P. 39(d). See 5TH CIR. R. 26.1.*

5TH CIR. R. 40 *PETITION FOR REHEARING*

40.1 Copies. *Four copies of all petitions for rehearing shall be filed. A party seeking panel rehearing must attach to the petition an unmarked copy of the opinion or order sought to be reviewed. If the party contemporaneously files a petition for rehearing en banc and attaches a copy of the opinion or*

order required by 5TH CIR. R. 35.2.10, the party does not have to attach a copy to the petition for panel rehearing.

40.2 Limited Nature of Petition for Panel Rehearing. *A petition for rehearing is intended to bring to the attention of the panel claimed errors of fact or law in the opinion. It is not used for reargument of the issue previously presented or to attack the court's well-settled summary calendar procedures. Petitions for rehearing of panel decisions are reviewed by panel members only.*

40.3 Length. *See FED. R. APP. P. 40(b).*

40.4 Time for Filing. *The clerk must receive a petition for rehearing within the time prescribed in FED. R. APP. P. 40(a).*

I.O.P. - NECESSITY FOR FILING - IT IS NOT NECESSARY TO FILE A PETITION FOR REHEARING IN THE COURT OF APPEALS AS A PREREQUISITE TO FILING A PETITION FOR CERTIORARI IN THE SUPREME COURT OF THE UNITED STATES.

CAPITAL CASES - CONSISTENT WITH LONG ESTABLISHED LEGAL PRINCIPLE AND UNIFORMLY FOLLOWED PRACTICE, THE FILING OF A PETITION FOR REHEARING DOES NOT CONSTITUTE OR OPERATE AS A STAY OF EXECUTION AND DOES NOT PRECLUDE CARRYING OUT AN EXECUTION.

5TH CIR. R. 41 ISSUANCE OF MANDATE; STAY OF MANDATE

41.1 Stay of Mandate - Criminal Appeals. *A motion for a stay of the issuance of a mandate in a direct criminal appeal filed under FED. R. APP. P. 41 shall not be granted simply upon request. Unless the petition sets forth good cause for stay or clearly demonstrates that a substantial question is to be presented to the Supreme Court, the motion shall be denied and the mandate thereafter issued forthwith.*

41.2 Recall of Mandate. *Once issued a mandate shall not be recalled except to prevent injustice.*

41.3 Effect of Granting Rehearing En Banc. *Unless otherwise expressly provided, the granting of a rehearing en banc vacates the panel opinion and judgment of the court and stays the mandate.*

41.4 Issuance of Mandate in Expedited Appeals or Mandamus Actions. *The clerk shall issue the mandate forthwith in any expedited appeal of a criminal sentence and in actions denying mandamus relief, unless instructed otherwise by the court.*

I.O.P. - ABSENT A MOTION FOR STAY OR A STAY BY OPERATION OF AN ORDER, RULE, OR PROCEDURE, MANDATES WILL ISSUE PROMPTLY ON THE 8TH CALENDAR DAY AFTER THE TIME FOR FILING A PETITION FOR REHEARING EXPIRES; OR AFTER ENTRY OF AN ORDER DENYING THE PETITION. AS AN EXCEPTION, AND BY COURT DIRECTION, THE CLERK SHALL IMMEDIATELY ISSUE THE MANDATE WHEN THE COURT DISMISSES A CASE FOR FAILURE TO PROSECUTE AN APPEAL OR FOR LACK OF JURISDICTION, OR IN

SUCH OTHER INSTANCES AS THE COURT MAY DIRECT. THE ORIGINAL RECORD AND ANY EXHIBITS WILL BE RETURNED TO THE CLERK OF THE DISTRICT COURT WITH THE MANDATE.

5TH CIR. R. 42 VOLUNTARY DISMISSAL

42.1 Dismissal by Appellant. *In all cases where the appellant or petitioner files an unopposed motion to withdraw the appeal or agency review proceeding, the clerk shall enter an order of dismissal and issue a copy of the order as the mandate.*

42.2 Frivolous and Unmeritorious Appeals. *If upon the hearing of any interlocutory motion or as a result of a review under 5TH CIR. R. 34, it appears to the court that the appeal is frivolous and entirely without merit, the appeal will be dismissed.*

42.3 Dismissal for Failure To Prosecute.

42.3.1 In direct criminal appeals proceeding in forma pauperis, the provisions of 5TH CIR. R. 42.3.1.1 and 42.3.1.2 apply. In habeas cases, actions filed under 28 U.S.C. § 2255, and other prisoner matters proceeding in forma pauperis, the provisions of 5TH CIR. R.42.3.1.1 apply if the appellant is represented by counsel; prisoners proceeding pro se will be given an initial written deadline for filing a certificate of appealability, filing any briefs, for paying fees, or for complying with other directives of the court. If pro se prisoners do not meet the deadline established, or timely request an extension of time, the clerk will dismiss the appeal without further notice, 15 days after the deadline date.

42.3.1.1 Appeals with Counsel. If appellant is represented by appointed or retained counsel, the clerk shall issue a notice to counsel that, upon expiration of 15 days from the date of the notice, the appeal may be dismissed for want of prosecution unless prior to that date the default is remedied, and must enter an order directing counsel to show cause within 15 days from the date of the order why disciplinary action should not be taken against counsel. If the default is remedied within that time, the clerk must not dismiss the appeal and may refer to the court the matter of disciplinary action against the attorney. If the default is not remedied within that time, the clerk may enter an order dismissing the appeal for want of prosecution or may refer to the court the question of dismissal. The clerk must refer to the court the matter of disciplinary action against the attorney. The court may refer the matter of disciplinary action to a special master including but not limited to a district or magistrate judge.

42.3.1.2 Appeals without Counsel. The clerk must issue a notice to appellant that 15 days from the date of the notice the appeal will be dismissed for want of prosecution, unless the default is remedied before that date. If the default is remedied within that time, the clerk must not dismiss the appeal.

42.3.2 In all other appeals when appellant fails to order the transcript, fails to file a brief, or otherwise fails to comply with the rules of the court, the clerk must dismiss the appeal for want of prosecution.

42.3.3 In all instances of failure to prosecute an appeal to hearing as required, the court may take such other action as it deems appropriate.

42.3.4 An order dismissing an appeal for want of prosecution must be issued to the clerk of the district court as the mandate.

42.4 Dismissals Without Prejudice. *In acting on a motion under 5TH CIR. R. 27.1.3 to stay further proceedings, the clerk may enter such appeals or agency review proceedings as dismissed without prejudice to the right of reinstatement of the appeal within 180 days from the date of dismissal. Any party desiring reinstatement, or an extension of the time to seek reinstatement, must notify the clerk in writing within the time period allowed for reinstatement. This procedure does not apply where the stay is sought pending a decision of this court in another case, a decision of the Supreme Court, or a stay on the court's own motion. If the appeal is not reinstated within the period fixed, the appeal is deemed dismissed with prejudice. However, an additional period of 180 days from the date of dismissal will be allowed for applying for relief from a dismissal with prejudice which resulted from mistake, inadvertence, or excusable neglect of counsel or a pro se litigant.*

5TH CIR. R. 45 DUTIES OF CLERKS

45.1 Location. *The clerk's office is maintained in the city of New Orleans, Louisiana.*

45.2 Release of Original Papers. *The clerk may release original records or papers without a court order for a limited time upon a party's or counsel's request, to facilitate preparation of a brief in a pending appeal.*

45.3 Office To Be Open. *The clerk's office is open for business on all days except Saturdays, Sundays, designated federal holidays, and Mardi Gras.*

I.O.P. - OFFICE HOURS ARE FROM 8:00 A.M. TO 5:00 P.M. CENTRAL TIME MONDAY THROUGH FRIDAY.

(A) THE CLERK'S OFFICE WELCOMES TELEPHONE INQUIRIES FROM COUNSEL CONCERNING RULES AND PROCEDURES. TELEPHONE NO. (504) 310-7700.

(B) IN EMERGENCY SITUATIONS AFTER NORMAL OFFICE HOURS, OR ON WEEKENDS, CALL THE NUMBER SHOWN ABOVE. AN AUTOMATED ATTENDANT PROVIDES AN OPTION CONNECTING THE CALLER TO THE EMERGENCY DUTY DEPUTY.

5TH CIR. R. 46 ATTORNEYS

46.1 Admission and Fees. *Attorneys must have and maintain a valid underlying license to practice law issued by a governmental licensing authority listed in FED R. APP. P 46(a)(1) to be admitted and continue to practice before this court. Admission is governed by FED. R. APP. P. 46 and this rule. Effective January 1, 2002, newly admitted attorneys are admitted for a period of 5 years. At the conclusion of the 5 year period, and upon notice from the clerk, they will have to reapply for admission. Attorneys who were admitted prior to January 1, 2002, are required, following 5 years after their admission and upon notice from the clerk, to reapply for admission for a 5 year period. Each attorney must pay the clerk an admission and readmission fee fixed by court order. An attorney appointed to represent an appellant*

in forma pauperis and an attorney who appears on behalf of the United States must have all other qualifications for admission, but is admitted in this court without paying an admission fee.

46.2 Suspension or Disbarment. *In addition to FED. R. APP. P. 46(b), attorneys may be suspended or removed from the roll of attorneys permitted to practice before this court if the appropriate law licensing authority withdraws or suspends the attorney's license to practice law, or the license to practice lapses.*

46.3 Entry of Appearance. *Attorneys admitted to the bar of this court must enter their appearance in each case in which they participate at the time the case is docketed or upon notice by the clerk. A form for entry of appearance is provided by the clerk. In addition to other pertinent information, the form requires counsel to cite all pending related cases and any cases on the docket of the Supreme Court, or this or any other United States Court of Appeals, which involve a similar issue or issues. Counsel must update such information at the time of briefing. Counsel must also indicate on the form whether the appeal is in a category of cases requiring preference in processing and disposition as set out in 5TH CIR. R. 47.7.*

I.O.P. - DISCIPLINARY ACTION - FED. R. APP. P. 46(B) AND (C) GOVERN THE PROCEDURES FOLLOWED TO INVOKE DISCIPLINARY ACTION AGAINST ANY MEMBER OF THE BAR OF THIS COURT FOR FAILURE TO COMPLY WITH THE RULES OF THIS COURT, OR FOR CONDUCT UNBECOMING A MEMBER OF THE BAR.

DUTIES OF COURT APPOINTED COUNSEL - THE JUDICIAL COUNCIL OF THE FIFTH CIRCUIT HAS ADOPTED A PLAN UNDER THE CRIMINAL JUSTICE ACT DETAILING THE DUTIES AND RESPONSIBILITIES OF COURT APPOINTED COUNSEL. A COPY OF THIS PLAN IS AVAILABLE FROM THE CLERK.

AN APPOINTED COUNSEL MAY CLAIM COMPENSATION FOR SERVICES FURNISHED BY A PARTNER OR ASSOCIATE WITHIN THE MAXIMUM COMPENSATION ALLOWED BY THE ACT. HOWEVER, THE COURT EXPECTS COURT-APPOINTED COUNSEL TO TAKE THE LEAD IN PREPARING THE BRIEF AND PRESENTING ORAL ARGUMENT, IF ARGUMENT IS ALLOWED. CLAIMS BY ASSOCIATE COUNSEL FOR IN-COURT SERVICES AND TRAVEL EXPENSES INCURRED IN CONNECTION THEREWITH ARE NOT ALLOWED UNLESS THE PARTNER OR ASSOCIATE IS APPOINTED UNDER THE CRIMINAL JUSTICE ACT ON ADVANCE MOTION AND APPROVAL BY THE COURT.

5TH CIR. R. 47 OTHER FIFTH CIRCUIT RULES

47.1 Name, Seal and Process.

(a) Name. The name of this court is "United States Court of Appeals for the Fifth Circuit."

(b) Seal. The seal of this court contains the American eagle encircled with the words "United States Court of Appeals" on the upper part of the outer edge; and the words "Fifth Circuit" on the lower part of the outer edge, running from left to right.

(c) Writs and Process. Writs and process of this court are under the seal of the court and signed by the clerk.

47.2 Sessions. *Court sessions are held in each of the states constituting the circuit at least once each year. Sessions may be scheduled at any location having adequate facilities. On motion of a party or on the court's own motion, the court may change the hearing of any appeal to another location or time.*

47.3 Circuit Executive, Library, and Staff Attorneys.

(a) Circuit Executive. The circuit executive's office is maintained at New Orleans, Louisiana. The circuit executive acts as Secretary of the Judicial Council of the Fifth Circuit, provides administrative support to the court, and performs such other duties as the judicial council or the chief judge assigns.

(b) Library. A public library is maintained at New Orleans, Louisiana, which is open during hours fixed by the court. Books and materials may not be removed from the library without permission of the librarian. Other libraries may be maintained at such places in the circuit as the court designates.

(c) Staff Attorneys. A central staff of attorneys is maintained at New Orleans, Louisiana, to perform such research and record analysis as the court directs.

47.4 Bankruptcy Appeals.

47.4.1 The FED. R. APP. P. and 5TH CIR. R. apply to all appeals from United States Bankruptcy Courts to this court.

47.4.2 Appeals docketed in the district court or with the clerk of any authorized appellate panels, may not be transferred to this court unless the district judge or appellate panel approves the transfer in writing.

47.5 Publication of Opinions.

47.5.1 Criteria for Publication. The publication of opinions that merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession. However, opinions that may in any way interest persons other than the parties to a case should be published. Therefore, an opinion is published if it:

(a) Establishes a new rule of law, alters, or modifies an existing rule of law, or calls attention to an existing rule of law that appears to have been generally overlooked;

(b) Applies an established rule of law to facts significantly different from those in previous published opinions applying the rule;

(c) Explains, criticizes, or reviews the history of existing decisional or enacted law;

(d) Creates or resolves a conflict of authority either within the circuit or between this circuit and another;

(e) Concerns or discusses a factual or legal issue of significant public interest; or

(f) Is rendered in a case that has been reviewed previously and its merits addressed by an opinion of the United States Supreme Court.

An opinion may also be published if it:

> *Is accompanied by a concurring or dissenting opinion; or reverses the decision below or affirms it upon different grounds.*

47.5.2 Publication Decision. An opinion shall be published unless each member of the panel deciding the case determines that its publication is neither required nor justified under the criteria for publication. If any judge of the court or any party so requests the panel shall reconsider its decision not to publish an opinion. The opinion will be published if, upon reconsideration, each member of the panel determines that it meets one or more of the criteria for publication or should be published for any other good reason, and the panel issues an order to publish the opinion.

47.5.3 Unpublished Opinions Issued Before January 1, 1996. Unpublished opinions issued before January 1, 1996,* are precedent. However, because every opinion believed to have precedential value is published, such an unpublished opinion should normally be cited only when the doctrine of res judicata, collateral estoppel or law of the case is applicable (or similarly to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorney's fees, or the like). A copy of any unpublished opinion cited in any document being submitted to the court, must be attached to each copy of the document.*

47.5.4 Unpublished Opinions Issued on or After January 1, 1996. Unpublished opinions issued on or after January 1, 1996,* are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case (or similarly to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorney's fees, or the like). An unpublished opinion may, however, be persuasive. An unpublished opinion may be cited, but if cited in any document being submitted to the court, a copy of the unpublished opinion must be attached to each document. The first page of each unpublished opinion bears the following legend:*

> *Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.*

47.5.5 Definition of "Published." An opinion is considered as "published" for purposes of this rule when the panel deciding the case determines, in accordance with 5TH CIR. R. 47.5.2, that the opinion

shall be published and the opinion is issued.

**Effective date of amended Rule.*

47.6 Affirmance Without Opinion. *The judgment or order may be affirmed or enforced without opinion when the court determines that an opinion would have no precedential value and that any one or more of the following circumstances exists and is dispositive of a matter submitted for decision: (1) that a judgment of the district court is based on findings of fact that are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) in the case of a summary judgment, that no genuine issue of material fact has been properly raised by the appellant; and (5) no reversible error of law appears. In such case, the court may, in its discretion, enter either of the following orders: "AFFIRMED. See 5TH CIR. R. 47.6." or "ENFORCED. See 5TH CIR. R. 47.6."*

47.7 Calendaring Priorities. *The following categories of cases are given preference in processing and disposition: (1) appeals in criminal cases, (2) habeas corpus petitions and motions attacking a federal sentence, (3) proceedings involving recalcitrant witnesses before federal courts or grand juries under 28 U.S.C. § 1826, (4) actions for temporary or preliminary injunctive relief, and (5) any other action if good cause therefor is shown. (FED. R. APP. P. 45(b) and 28 U.S.C. § 1657).*

47.8 Attorney's Fees.

47.8.1 Supporting Requirements. Petitions or motions for the award of attorney's fees should always be supported by contemporaneous time records recording all work for which a fee is claimed and reflecting the hours or fractional hours of work done and the specific professional level of services performed by each lawyer seeking compensation. In the absence of such records, time expended will not be considered in setting the fee beyond the minimum amount necessary in the court's judgment for any lawyer to produce the work seen in court. Exceptions may be made only to avoid an unconscionable result.

The clerk shall make reasonable efforts to advise counsel about this rule, but whether or not counsel has been advised, ignorance of this rule is not, standing alone, grounds for an exception. If the reasonableness of the hours claimed on the basis of time records becomes an issue, the applicant must make time records available for inspection by opposing counsel and, if a dispute is not resolved between them, by the court.

47.8.2 Attorney's Fees and Expenses Under the Equal Access to Justice Act. This rule implements the provisions of the Equal Access to Justice Act, Public Law No. 96-481, 94 Stat. 2325 (1980).

(a) Applications to the Court of Appeals. An application for an award of fees and expenses pursuant to 28 U.S.C. § 2412(d)(1)(B) must identify the applicant and the proceeding for which an award is sought. The application must show the nature and extent of services provided in this court and that the applicant has prevailed, and must identify the position of the United States or an agency thereof that the applicant alleges was not substantially justified.

(b) Petitions by Permission. A petition for leave to appeal pursuant to 5 U.S.C. § 504(c)(2) must be filed with the clerk of the court of appeals within 30 days after the entry of the agency's order, with proof of service on all other parties to the agency's proceedings.

(c) The petition must contain a copy of the order to be reviewed and any findings of fact, conclusions of law, and opinion relating thereto, a statement of the facts necessary to an understanding of the petition, and a memorandum showing why the petition for permission to appeal should be granted. An answer may be filed within 30 days after service of the petition, unless otherwise directed by the court. The application and any answer shall be submitted without further briefing and oral argument unless otherwise ordered.

(d) An original and 3 copies must be filed with the court.

(e) Within 10 days after the entry of an order granting permission to appeal, the applicant must pay the clerk of this court the docket fee prescribed by the Judicial Conference of the United States. Upon receipt of the payment, the clerk shall enter the appeal upon the docket. The record shall be transmitted and filed in accordance with FED. R. APP. P. 17. A notice of appeal need not be filed.

(f) Appeals/Petitions to Review. Appeals and petitions to review matters otherwise contemplated by the Equal Access to Justice Act may be filed pursuant to the applicable statutes and rules of the court.

47.9 Rules for the Conduct of Proceedings Under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351 et seq.

See separately published Judicial Council of the Fifth Circuit Rules Governing Complaints of Judicial Misconduct or Disability effective April 15, 1993 as amended through July 15, 2003.

47.10 Rule Governing Appeals Raising Sentencing Guidelines Issues - 18 U.S.C. § 3742.

47.10.1 Scope of Rules. These rules govern procedures in appeals raising sentencing issues pursuant to 18 U.S.C. § 3742(a) or (b). These cases will proceed in the same manner and under the general rules of court governing other appeals and will not be given special expedited treatment over other criminal cases, except as hereinafter specified.

47.10.2 Motion to Expedite. If the defendant is incarcerated for a period of 1 year or less pursuant to the sentence appealed, a party may file a motion to expedite the appeal upon a showing of irreparable harm. The motion must set out: (a) when the trial transcript can be prepared and made available; and, (b) how soon thereafter appellant can file a brief. The court disfavors bifurcation of issues concerning sentencing from those issues involving the conviction.

47.10.3 The Appellate Record.

(a) Oral Reasons for Imposition of Sentence. The oral statement of reasons of the district court for imposition of a sentence as required by 18 U.S.C. § 3553(c), as amended, must be reduced to writing, filed, and incorporated in the record on appeal.

(b) Transcript of Sentencing Proceedings. In addition to the requirements of FED. R. APP. P. 10(b) and 5TH CIR. R. 10.1 for ordering the transcript of trial proceedings, appellant is required to order a transcript of the entire sentencing proceeding (excluding the oral statement of reasons for sentencing of the district court) if a sentencing issue under 18 U.S.C. § 3742 will be raised on appeal.

(c) Presentence Report. If a notice of appeal is filed as authorized by 18 U.S.C. § 3742(a) and (b) for review of a sentence, the clerk shall transmit to this court the presentence report. The report is transmitted separately from other parts of the record on appeal and is labeled as a sealed record if sealed by the district court.

(d) Presentence reports filed in this court as part of a record on appeal are treated as matters of public record except where the report, or a portion thereof was sealed by order of the district court.

(e) Counsel wishing access to, or a copy of, sealed presentence reports, or portions of such reports, may request them from the clerk's office by such means as the clerk permits. Counsel must return the copy of the presentence report, without duplicating it. Counsel should avoid disclosure of confidential matters in their public filings.

OTHER INTERNAL OPERATING PROCEDURES

JUDICIAL COUNCIL - THE JUDICIAL COUNCIL ESTABLISHED BY 28 U.S.C. § 332 IS COMPOSED OF 19 JUDGES - THE CHIEF CIRCUIT JUDGE, NINE CIRCUIT JUDGES, AND NINE DISTRICT JUDGES. THE CHIEF CIRCUIT JUDGE AND THE ACTIVE CIRCUIT JUDGE NEXT IN SENIORITY SERVE PERMANENT TERMS. ALL OTHER COUNCIL MEMBERS SERVE FOR STAGGERED THREE-YEAR TERMS. THE COUNCIL MEETS ON CALL OF THE CHIEF CIRCUIT JUDGE PURSUANT TO STATUTE.

JUDICIAL CONFERENCE - PURSUANT TO 28 U.S.C. § 333, THE CHIEF CIRCUIT JUDGE MAY SUMMON BIENNIALLY OR ANNUALLY THE FEDERAL JUDGES OF THE CIRCUIT TO A CONFERENCE, AT A DESIGNATED TIME AND PLACE, FOR THE PURPOSE OF CONSIDERING THE STATE OF BUSINESS OF THE COURTS AND ADVISING MEANS OF IMPROVING THE ADMINISTRATION OF JUSTICE WITHIN THE CIRCUIT. A COPY OF THE COURT'S RULE FOR REPRESENTATION AND ACTIVE PARTICIPATION OF THE MEMBERS OF THE BAR OF THE CIRCUIT IS AVAILABLE FROM THE CLERK OR CIRCUIT EXECUTIVE.

LAWYERS ADVISORY COMMITTEE - THE COURT IS ASSISTED IN ITS RULE-MAKING FUNCTION AND IN THE DRAFTING OF THESE INTERNAL OPERATING PROCEDURES BY A COMMITTEE COMPOSED OF 2 LAWYERS FROM EACH STATE IN THE CIRCUIT. THESE LAWYERS ARE APPOINTED FOR STAGGERED TERMS BY

THE CHIEF JUDGE UPON RECOMMENDATION OF THE CIRCUIT JUDGES FROM THAT STATE. THEIR TERMS ARE FOR 2 YEARS. THEY EXAMINE AND COMMENT UPON SUGGESTED RULE AND PROCEDURE CHANGES.

RECUSAL OR DISQUALIFICATION OF JUDGES

(A) GROUNDS - JUDGES MAY RECUSE THEMSELVES UNDER ANY CIRCUMSTANCES CONSIDERED SUFFICIENT TO REQUIRE SUCH ACTION. JUDGES MUST DISQUALIFY THEMSELVES UNDER CIRCUMSTANCES SET FORTH IN 28 U.S.C. § 455, OR IN ACCORDANCE WITH CANON 3C, CODE OF CONDUCT FOR UNITED STATES JUDGES AS ADOPTED BY THE JUDICIAL CONFERENCE OF THE UNITED STATES.

(B) PROCEDURE

(1) ADMINISTRATIVE MOTIONS - IF AN INITIATING JUDGE RECUSES HIMSELF OR HERSELF FROM CONSIDERING, OR IS DISQUALIFIED TO CONSIDER AN ADMINISTRATIVE MOTION, HE OR SHE WILL NOTIFY THE CLERK, WHO WILL ADVISE THE RECUSED JUDGE OF THE NEXT INITIATING JUDGE AND REQUEST THAT THE FILE BE SENT TO THAT JUDGE.

(2) SUMMARY CALENDAR CASES - THE ABOVE PROCEDURE IS FOLLOWED, EXCEPT THAT THE SUBSTITUTE OR BACKUP JUDGE IS CALLED BECAUSE IT IS COURT PRACTICE THAT CASES ARE NOT ORDINARILY DISPOSED OF ON THE MERITS BY ONLY 2 JUDGES.

(3) HEARING CALENDAR CASES - PRIOR TO THE FORMAL PUBLICATION OF THE COURT CALENDAR, EACH JUDGE ON THE PANEL IS FURNISHED WITH A COPY OF THE 5TH CIR. R. 28.2.1 CERTIFICATE OF INTERESTED PERSONS FOR THE JUDGE'S STUDY TO DETERMINE WHETHER RECUSAL OR DISQUALIFICATION IS APPROPRIATE.

(C) IF A JUDGE RECUSES, OR IS DISQUALIFIED, HE OR SHE IMMEDIATELY NOTIFIES THE OTHER MEMBERS OF THE PANEL, AND ARRANGEMENTS ARE MADE FOR A SUBSTITUTE JUDGE.

SPECIAL PANELS AND CASES REQUIRING SPECIAL HANDLING

CORPORATE REORGANIZATION - CHAPTER 11

THE FIRST APPEAL IS HANDLED IN THE USUAL MANNER. COUNSEL MUST STATE IN THEIR BRIEFS WHETHER THE PROCEEDING IS LIKELY TO BE COMPLEX AND PROTRACTED SO THAT THE PANEL CAN DETERMINE WHETHER IT SHOULD ENTER AN ORDER DIRECTING THAT IT WILL BE THE PERMANENT PANEL FOR SUBSEQUENT APPEALS IN THE SAME MATTER. IF THERE ARE LIKELY TO BE SUCCESSIVE APPEALS, A SINGLE PANEL MAY THUS BECOME FULLY FAMILIAR WITH THE CASE THUS MAKING THE HANDLING OF FUTURE APPEALS MORE EXPEDITIOUS AND ECONOMICAL FOR LITIGANTS, COUNSEL AND THE COURT. (FOR THE RULE REGARDING DIRECT APPEALS IN BANKRUPTCY MATTERS SEE 5TH CIR. R. 47.4).

CRIMINAL JUSTICE ACT PLAN - THE COURT HAS ADOPTED A PLAN AND GUIDELINES UNDER THE CRIMINAL JUSTICE ACT. COPIES ARE AVAILABLE FROM THE CLERK.

CERTIFIED RECORDS FOR SUPREME COURT OF THE UNITED STATES - THE CLERK'S OFFICE DOES NOT PREPARE A CERTIFIED RECORD UNLESS THE CLERK OF THE UNITED STATES SUPREME COURT SO DIRECTS. (SEE GENERALLY SUP. CT. R. 12.7, 16.2, AND 19.4).

BUILDING SECURITY

(A) REASONS FOR BUILDING SECURITY - THESE RULES ARE TO MINIMIZE INTERFERENCE WITH AND DISRUPTIONS OF THE COURT'S BUSINESS, TO PRESERVE DECORUM IN CONDUCTING THE COURT'S BUSINESS AND TO PROVIDE EFFECTIVE SECURITY IN THE JOHN MINOR WISDOM UNITED STATES COURT OF APPEALS BUILDING AND GARAGE LOCATED AT 600 CAMP STREET, NEW ORLEANS, LOUISIANA. THESE ENTIRE PREMISES ARE CALLED THE BUILDING.

(B) SECURITY PERSONNEL - THE TERM "SECURITY PERSONNEL" MEANS THE U.S. MARSHAL OR DEPUTY MARSHAL, COURT SECURITY OFFICER, OR A MEMBER OF THE FEDERAL PROTECTIVE SERVICE POLICE.

(C) CARRYING OF PARCELS, BAGS, AND OTHER OBJECTS - SECURITY PERSONNEL SHALL INSPECT ALL OBJECTS CARRIED BY PERSONS ENTERING THE BUILDING. NO ONE SHALL ENTER OR REMAIN IN THE BUILDING WITHOUT SUBMITTING TO AN INSPECTION.

(D) SEARCH OF PERSONS - SECURITY PERSONNEL MAY SEARCH ANY PERSON ENTERING THE BUILDING OR ANY SPACE IN IT. ANYONE WHO REFUSES A SEARCH MUST BE DENIED ENTRY.

(E) UNSEEMLY CONDUCT - NO PERSON SHALL:

(1) LOITER, SLEEP OR CONDUCT ONESELF IN AN UNSEEMLY OR DISORDERLY MANNER IN THE BUILDING;

(2) INTERFERE WITH OR DISTURB THE CONDUCT OF THE COURT'S BUSINESS IN ANY MANNER;

(3) EAT OR DRINK IN THE HALLS OF THE BUILDING OR IN ANY COURTROOMS EXCEPT AT COURT APPROVED SOCIAL FUNCTIONS;

(4) BLOCK ANY ENTRANCE TO OR EXIT FROM THE BUILDING OR INTERFERE IN ANY PERSON'S ENTRY INTO OR EXIT FROM THE BUILDING.

(F) ENTERING AND LEAVING - ALL PERSONS MUST ENTER AND LEAVE COURTROOMS ONLY THROUGH SUCH DOORWAYS AND AT SUCH TIMES AS ARE DESIGNATED BY THE SECURITY PERSONNEL.

(G) SPECTATORS - THE ENTRANCE AND DEPARTURE OF SPECTATORS TO OR FROM COURTROOMS IS SUBJECT TO THE PRESIDING JUDGE'S DIRECTIONS. THE U. S. MARSHAL

MAY DESIGNATE SPECTATOR SEATING IN ANY COURTROOM. SPECTATORS EXCLUDED BECAUSE OF LACK OF SEATING AND SPECTATORS LEAVING THE COURTROOM WHILE COURT IS IN SESSION OR ANY RECESS SHALL NOT LOITER OR REMAIN IN THE AREA ADJACENT TO THE COURTROOM.

(H) CAMERAS AND ELECTRONIC EQUIPMENT - NO PERSON SHALL INTRODUCE OR ATTEMPT TO INTRODUCE ANY TYPE OF CAMERA, RECORDING EQUIPMENT, OR OTHER TYPE OF ELECTRICAL OR ELECTRONIC DEVICE INTO THE BUILDING WITHOUT THE COURT'S PERMISSION.

(I) WEAPONS - EXCEPT FOR SECURITY PERSONNEL, NO PERSON SHALL BE ADMITTED TO OR ALLOWED TO REMAIN IN THE BUILDING WITH ANY OBJECT THAT MIGHT BE EMPLOYED AS A WEAPON UNLESS AUTHORIZED IN WRITING BY THE COURT TO DO SO.

(J) ENFORCEMENT - SECURITY PERSONNEL SHALL ENFORCE THESE SECURITY PROVISIONS AND ANY OTHER PROVISIONS THE COURT MIGHT IMPLEMENT. ATTORNEYS AND PARTIES WHO VIOLATE THESE PROVISIONS ARE SUBJECT TO, INTER ALIA, CONTEMPT PROCEEDINGS AND SANCTIONS.